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Competition Law Between Old Goals and New Challenges

New tools for a 'multi-value' approach vis-à-vis: Digitalisation, Inequalities, and Climate Changes

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Before being a job, academic research is a passion. One may wonder why, but the answer is at the meantime both simple and impossible to express properly. However, if I have to try providing such an explanation, I would surely refer to freedom, although linked to responsibility. These two concepts, in my view, inform the whole life of an academic researcher, at the point that they become values that inform the whole life of such a person, not only on the professional layer, but also personally. This is what happens when jobs are not only jobs, but they are passions.

However, why freedom and responsibility? Freedom involves the freedom to research on any topic an academic is willing to discover. It is related to curiosity, and it is a privilege that I think only the academic work allows. Anyhow, this curiosity is also rooted into responsibility, as usually an academic feels the responsibility to reach outcomes that could improve the society's well-being. This is exactly what moved my research. I remember when I was following my course on competition law at the University of Torino, held by the late Professor Frignani. I remember the fascination for this dynamic discipline, which was both legal and economic, but which, above all, was directed at improving the 'welfare' (please do not care here about what the expression 'consumer welfare' means!). While thinking on my own and observing the society in which we live, I felt the need to understand if this powerful and very charming discipline could have played a role in improving our lives (so, considering the welfare of humans, not only of consumers). This curiosity – stemmed from the freedom to choose my research topic and the responsibility to figuring out better solutions for our society – guided me during my research. What I hope is that the reader could find these elements through the lines I wrote.

During this journey I had the opportunity to meet various people, who, using a Dantesque metaphor, were a sort of Virgilio for me, each one for its own role.

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I would like to thank my parents for their support and presence during all the phases of my life and my career. Without their efforts I would not be here writing this research.

Thanks also to my only left grandmother Giuseppina, whose strength, at 90 years old, is an example of how looking forward is always the only solution for succeeding.

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Abstract

The research question that moves the present work is *whether* and *how* competition law shall play a role in making our society more 'sustainable', intending this term in a broad meaning, and therefore linked to social, economic and environmental sustainability. The question raises from the awareness of the problems that are affecting our society, also if we refer at its democratic foundations. In particular, we considered that issues such as increasing income inequalities, raising market concentration rates and the even faster climate changes are topics that cannot be outside the academic analysis of the various policies.

Therefore, if we try to answer at the question *if* competition law shall play a role in this context, the analysis should start from the very foundations of this discipline. At this purpose, in our research, we scrutinised how the most representative competition law regimes in the world - *i.e.*, the US antitrust law and the EU competition law systems – developed during their history. This analysis is conducted by reading through legislative sources, policy statements, judicial decisions and scholar works. What emerges is that competition law shall not only be focused on mere economic and econometric objectives, such economic efficiency, but it was intended more as a structural instrument, created for preventing the concentration of an excessive degree of economic power on the same subject or on a bounce of entities. Therefore, after having affirmed this structuralist aim of competition law, it is possible to understand how every other objective shall be considered as a by-product of a healthy competitive process, and not as an end of competition law in itself. This is particularly clear in the European context, as competition law ought not to be intended as a separate or lone subject, but as a field of law well rooted into the EU and its Member States' constitutional traditions.

After having established that competition law shall play a role in the transition towards a more sustainable society, the focus moves on *how* this task shall be performed. For this purpose, the present research scrutinised the issues we mentioned before, by making a comparative analysis between the EU and the U.S. competition law and antitrust models and, inside the EU environment, among the various solutions adopted in the Member

States. This analysis first needed to be carried out by means of an empirical assessment of the issue at stake, especially from an economic standpoint. Then, the legal tools needed in order to reach the desired outcomes were scrutinised, first by making reference to the solutions already adopted by enforcers and Courts on the basis of the existing rules, and, subsequently, new tools are analysed and proposed.

In particular, the research establishes a connection between income inequalities and the increasing rates of market concentration. The latter dynamic was deemed particularly intense in the digital market context, which are characterised by market dynamics which escape from the common understanding of competition, as they lead the market to tip in favour of a firm, usually the first mover. In a nutshell, they are characterised by a sort of *winner takes all* structure. This field represents the core of this research, as it is where excessive market concentration shows most its detrimental effects and the need to a structuralist approach to competition law appears much needed. Therefore, this work aims to provide its contribution to the very active academic debate on this field.

However, this research does not want to be limited to the digital market problem but is directed at casting lights on the need for a *multi-value* approach to competition law at 360 degrees, which can turn into a *multi-tool* enforcement to better tailor the application of competition rules to all the analysed issues, which are however interrelated thanks to the broad concept of 'sustainability' outlined above, in line with the Brundtland Report on sustainability issued in 1987 by the World Commission on Environment and Development.

What emerges is that competition law ought to play a role in the transition towards a more sustainable economy and society. This depends on policy choices, and this work is aimed – in the realm of the current scholar debate on this topic – at providing its constructive contribution. However, what is important to affirm is that policy choices directed at establishing the *multi-value* and *multi-tool* competition law described above are not only based on progressive or hipster academic ideas, but they are deeply rooted into our societies' constitutional traditions, and, in the end, in a healthy conception of the liberal economy itself.

1

Introduction: The research object

[…] And globalisation can offer a better deal for consumers – but only if competition keeps working the way it should. […] The challenges we're facing, at the start of this new decade, mean that we need to look again at the tools we use to enforce the competition rules.[1]

The reported speech by the European Commission's Vice-President Margrethe Vestager has been chosen to introduce the present work because it implicitly poses the question that this research tries to answer, that is whether competition law and its tools, as currently interpreted and applied, are up to date in order to face the challenges brought by issues such as digitisation, income inequality and environmental protection. The mentioned topics are central in the current political and policy debate and, although competition law is not the cure for every societal disease, it may play a central role. In this sense, the designation of Commissioner Vestager for a second term, with a portfolio enriched with the task of *setting the*

[1] European Commission's Executive Vice-President Margrethe Vestager, *Defining markets in a new age*, speech delivered at the Chillin' Competition Conference, Brussels, 9 December 2019, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en (accessed 1 February 2021).

strategic direction of the political priority "Europe Fit for the Digital Age"[2] may well render the decisive moment that competition law is facing. In this second designation we can see the need for continuity in a time of societal changes and very stimulating debate in the competition law realm, as well as the formal recognition by the Commission of the need to 'regulate' the digital world.[3] Given this brief premise, this introductory chapter will summarise the content, the background, and the scope of the present research work.

1. Overview of the research

The aim of the present thesis is to understand *whether* and, in case of positive answer, *how* competition law can play a role in reaching a more sustainable economy. In particular, this research will investigate if the current competition law provisions and praxis are adequate in order to face the mentioned challenges or if our legal systems need innovative interpretations of the present rules or brand new ones, as well. In order to perform this task, we are well aware of the fact that digitalisation, income inequalities, and environmental issues might appear problems without close ties among them. Nevertheless, what we will try to discover whether an analysis of the policy values that lie behind competition law might provide a unitary answer about the role that this discipline shall play in our society.

Our research will start from the contextualisation of competition law in the social and also political context in which it operates. In this sense, competition law is not intended as an *absolutum* (*i.e.* disjointed) field from society. Contrarywise, – as we will see more in depth – competition rules are influenced by the context in which they operate.[4] Taking this assumption as key to an understanding of the competition

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[2] https://ec.europa.eu/commission/commissioners/2019-2024/vestager_en (accessed 3 February 2021).

[3] The author intends to specify that the term 'regulate' has been used here in its generalist meaning, *i.e., to control, govern or direct* (Oxford English Dictionary). As a consequence, we are not proposing independent regulation of digital markets as the solution in this initial stage. The topic regarding the interplay between competition law, other fields of law and independent regulation will be discussed in deep below in the present work.

[4] R. Whish and D. Bailey, *Competition Law*, Oxford University Press, 2018, 19; A. Ezrachi, *Sponge*, Journal of Antitrust Enforcement, 2017, 5, 51-52.

discipline during this work, would allow us to understand how competition policy has evolved. Then, after having analysed this evolution, we may be able to scrutinise and propose the changes needed to adapt this 'chameleonic' discipline to the current social, economic and political context.

Therefore, the present work will be articulated in the following shape: First, it will be aimed at understanding which values ought to inform the interpretation and the creation of competition rules. For this purpose, after having provided an economic background for our research, an analysis of the goals which aimed the creation of competition law and the relevant enforcement, in an evolutive perspective, both in the U.S. and the EU environment, will be conducted.

Having regard to the US context, we will focus on the doctrinal debate that draws a parallelism between the situation faced by the U.S. economy in the early XX Century could be compared to the current one, as they are both allegedly characterized by the same main issue: Excessive market concentration.[5] This is the reason why authors like Professor Tim Wu talk of a *New Gilded Age*,[6] thus remembering the late XIX century *Gilded Age*, when big trusts and concentrations like Standard Oil and American Tobacco were growing.

A slightly different discourse shall be made with regard to the European Union. In the 'old continent', competition law saw its birth after World War II and it was animated by different aims if compared to the Sherman Act. In particular, European competition law[7] was first directed at creating and maintaining the then recently

[5] In this sense see, *inter alia*, T. Wu, *The Curse of Bigness*, Atlantic Books, 2020, 9; M.E. Stucke and A. Grunes, *Big Data and Competition Policy*, Oxford University Press, 2016, 249-250; M.E. Stucke, submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, 13 March 2020, available at https://judiciary.house.gov/uploadedfiles/submission_from_maurice_stucke.pdf (accessed 3 February 2021); J.E. Stiglitz, *America has a monopoly problem – And it's huge*, available at https://www.thenation.com/article/archive/america-has-a-monopoly-problem-and-its-huge/ (accessed 3 February 2021). J.B. Baker, J. Sallet, F. Scott Morton, *Introduction: Unlocking Antitrust Enforcement*, The Yale Law Journal, 2018, 127, 7, 1916-1917.

[6] T. Wu, *The Curse of Bigness*, cit., 9 and 161.

[7] It is worth specifying that the term 'competition law' is mostly used in the EU context, while the expression 'antitrust law' is more common in the U.S. This could be linked to the original structuralist shape of U.S. antitrust law, focused on contrasting big trusts. In Europe, the protection of a competitive (internal) market appeared (and still is) to be one of the main goals of competition law, necessary in order to reach the members States' market integration. On this point see S.W. Waller, *The Law and Economics Virus*, Cardozo Law Review, 2009, 31, 2, 395; M. Wasastjerna,

born single market. During the years following the creation of the European Community – as we will analyse further in this work – the broad language of EU competition law provisions was clarified by the interpretation given by the Commission and, above all, by the Court of Justice. This interpretative effort contributed at enriching the goals of EU competition law, which can be regarded, in the words of Ioannis Lianos, as a *polycentric*[8] ensemble or, by means of the telling metaphor adopted by Ariel Ezrachi, as a *sponge*.[9]

In light of the above, this research will also try to understand what role economic efficiency should play. This represent a fundamental research point, as, starting from the 1970s, US antitrust law – as we will see – has been deeply focused on the promotion of economic efficiency, and now also EU competition law has now tended to an approach more centred on economic efficiency, *a more economic approach*, as it has been called in the EU context.[10] In particular, it will be addressed whether economic efficiency may represent the sole – or however the main – aim of competition law. And, above all, if is it enough as a guiding principle for the competition law enforcement vis-à-vis the challenges that we have mentioned before and that we are asked to manage in the next future.

Given the introductory shape of this first chapter, we can briefly summarise a fundamental consideration that led us towards the present research work: The current structure of markets and the focus on efficiency can of course lead to some positive outcomes which can make our societies better off. Moreover, an efficiency-driven competition enforcement may of course improve competition provisions' applicative certainty. However, such an approach may also lead to

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Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?, Wolters Kluwer, 2020, 32.

[8] I. Lianos, *Polycentric competition law. The long story*, UCL Research Paper Series no. 2/2018, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3257296_code565608.pdf?abstractid=3257296&mirid=1.

[9] A. Ezrachi, *Sponge*, cit., 49.

[10] See, *inter alia*, EU Commissioner Mario Monti, *EU competition law*, speech delivered at the Fordham Annual Conference on International Antitrust Law & Policy, New York, 31 October 2002, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_533 (accessed 1 February 2021); EU Commissioner Mario Monti's interview, *The EU gets new competition powers for the 21st century*, available at https://ec.europa.eu/competition/publications/cpn/interview_monti.pdf (accessed 1 February 2021).

underenforcement of competition rules,[11] which can have as effects rising inequality rates and increasing market concentration levels.[12] This may suggest that something needs to be changed, because a growing number of people – and also companies – is now left behind, *i.e.* their economic situation is turning worse off. In this sense, Nobel Prize Laureate Joseph E. Stiglitz suggested that, *as Smith noted, there are incentives for firms to reduce market competition. Moreover, firms also strive to make sure that there are no strong laws prohibiting them from engaging in anticompetitive behavior or, when there are such laws, that they are not effectively enforced. The focus of businesspeople is, of course, not to enhance societal well-being broadly understood, or even to make markets more competitive: their objective is simply to make markets work* for them, *to make them more profitable. But the consequence is often a less efficient economy marked by greater inequality*.[13]

As we will address during this work, such a concentration of power may pose several threats to our democratic societies. At this purpose, we are experiencing a situation where some companies, *i.e.* the so-called *big techs* or *tech giants*, are assuming the size and the behaviours of Nation States.[14] This can have detrimental

[11] M.E. Stucke, *Big Data and Competition Policy*, n. 4, 232-255.

[12] With reference to the link between market concentration, competition law and income inequality, see, *inter alia*, J. Stiglitz, *Towards a broader view of competition policy*, in T. Bonakele, E.M. Fox, L. Mncube (Eds.), *Competition policy for the new era: Insights from the BRICS Countries*, Oxford University Press, 2017, 4; I. Lianos, *Competition law as a form of social regulation*, The Antitrust Bulletin, 65, 2020, 3.

[13] J. Stiglitz. *The Price of Inequality*, Norton, 2013, 43.

[14] See, *inter alia*, A. Celotto, *Facebook sta diventando uno stato. Una paradossale retrocessione: da cittadini statali a sudditi digitali*, Huffington Post, 5 January 2021, available at https://www.huffingtonpost.it/entry/facebook-sta-diventando-uno-stato_it_5ff42f27c5b6ec8ae0b59ce8 (accessed 1 February 2021); M. Schaake, *Big tech companies want to act like governments*, Financial Time, 20 February 2020, available at https://www.ft.com/content/36f838c0-53c5-11ea-a1ef-da1721a0541e (accessed 3 February 2021); A. Wichowski, *The U.S. can't regulate Big Tech companies when they act like nations*, The Washington Post, 29 October 2020, available at https://www.washingtonpost.com/outlook/2020/10/29/antitrust-big-tech-net-states/ (accessed 3 February 2021); A. Wichowski, *The Information Trade: How Big Tech Conquers Countries, Challenges our Rights, and Transforms our World*, HarperOne, 2020.
Of course, big tech companies, in comparison to nation-states, lack the fundamental elements of a common territory, culture and history. However, in a globalised scenario, where borders seem to blur, with particular reference to the internet *world*, we can see for instance a social network as a *sui generis* territory, where users sharing common interests may interact. Moreover, big companies, especially big tech, seem to some extent able to self-regulate their activity. These items can highlight some characteristic of such nations-like structure of big global corporations. Of course, this was also made possible by the absence of strong regulation on these activities, which were operating in a sort

consequences on the democratic process as well as on the freedom and the quality of information, just to name a few items of concern. In particular, as a small number of big tech corporations manage the stream of news and information by means of a 'gatekeeper' role between us and the source, we could be subject to information manipulation, censorship or bias,[15] in order to better keep our attention or to shape our behaviour in the way they most prefer. In addition, influences on elections pursued by means of social networks have been recorded, for instance during the 2016 U.S. Presidential elections.[16] The latter fact is of particular concern, because if we think that in most elections the candidates or the parties running for the presidency or the parliamentary majority are separated by few percentage points, the impact that biased or manipulated information may have on our democratic process is clear. In this sense the recent *Facebook Files* scandal is telling. The matter was originated by the whistleblowing of Frances Haugen, a former Facebook employee, which was published by means of a series of articles on The Wall Street Journal.[17] Frances Haugen then testified in front of the U.S. Senate in October 2021 and before the European Parliament in November 2021.[18] In detail, the

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of *Wild West* scenario (on the latter point see S. Ennis and A. Fletcher, *The Goldilocks Dilemma: When is Digital Regulation "Just Right"?*, Journal of European Competition Law & Practice, 2020, 11, 10, 551.

[15] Written Statement for the Record by M.E. Stucke and A. Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, 18 October 2019, 19, available at https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-20191018-SD010.pdf (accessed 3 February 2021).

[16] M.E. Stucke and A. Ezrachi, *Competition Overdose. How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, HarperCollins, 2020, 215-216. See also: *Facebook ad campaign helped Donald Trump win elections, claim executives*, BBC News, 8 January 2020, available at https://www.bbc.com/news/technology-51034641 (accessed 3 February 2021); P. Bump, *All the ways Trump's campaign was aided by Facebook, ranked by importance*, The Washington Post, 22 March 2018, available at https://www.washingtonpost.com/news/politics/wp/2018/03/22/all-the-ways-trumps-campaign-was-aided-by-facebook-ranked-by-importance/ (accessed 3 February 2021).

[17] *The Facebook Files*, The Wall Street Journal, available at https://www.wsj.com/articles/the-facebook-files-11631713039 (accessed 1 December 2021).

[18] European Parliament, *Frances Haugen to MEPs: EU digital rules can be a game changer for the world*, 8 November 2021, available at https://www.europarl.europa.eu/news/pt/press-room/20211107IPR16801/frances-haugen-to-meps-eu-digital-rules-can-be-a-game-changer-for-the-world (accessed 9 November 2021). The recording of Frances Haugen's speech in front of the European Parliament is available at https://multimedia.europarl.europa.eu/en/committee-on-internal-market-and-consumer-protection_20211108-1645-COMMITTEE-IMCO_vd (accessed 9 November 2021). See also C. Zakrzewski and P. Stein, *Facebook whistleblower hearing shows European polycimakers are ahead of the U.S. in regulating big tech*, The Washington Post, 8 November 2021, available at https://www.washingtonpost.com/technology/2021/11/08/haugen-facebook-whistleblower-eu-testimony/ (accessed 9 November 2021).

whistleblower revealed that Facebook, with the aim of privileging its increase in profits only, adopted behaviours that could result dangerous both for our societies' overall democratic structure and for the health of individuals. In fact, among the various practices carried out by the social network, it was sustained that Facebook did not apply its 'filtering' algorithm to posts published by certain 'elite' profiles, as well as it based certain strategic decisions on political grounds. Of course, given the important role of Facebook as a source of information for a very large number of citizens, this could result detrimental for the democratic process generally viewed. It was also sustained that Facebook was well aware of the negative consequences on teenagers (especially female) of the Instagram algorithm, capable of causing eating disorders. Notwithstanding this risk, the company did not intervene as it privileged pursuing its profits.[19] Therefore, it results evident from these revelations that a huge concentration of economic power into the hands of a bounce of companies can well become a danger for the very foundations of our societies. This constitutes the reasons why a deep analysis into the possibility to render competition law more 'sustainable' appears much needed.

In light of the above, this work is aimed at showing how competition law shall manage the referred new economic and societal challenges first by analysing the goals that lies behind the interpretation and application of competition rules, towards what we can define as a *multi-value* approach to competition law. However, goals and values are programmatic, not practical. Goals shall be applied by means of effective and efficient tools. Therefore, we will then scrutinise how the competition Authorities' toolbox shall be adapted to be ready for the current economic and societal challenges. This might lead to the specular side of the *multi-value* approach mentioned above, that is a *multi-tool* approach to this subject. However, the changes needed might not be so disruptive as one could think. This is fundamentally thanks to the flexible nature of competition law, which is one of the characteristics that has defined this field of law since its adoption. Indeed, in the

[19] M. McCluskey, *From Instagram's Toll on Teens to Unmoderated 'Elite' Users, Here's a Break Down of the Wall Street Journal's Facebook Revelations*, Time, 15 September 2021, available at https://time.com/6097704/facebook-instagram-wall-street-journal/ (accessed 9 November 2021); B. Perrigo, *How Facebook Forced a Reckoning by Shutting Down the Team That Put People Ahead of Profits*, Time, 7 October 2021, available at https://time.com/6104899/facebook-reckoning-frances-haugen/ (accessed 9 November 2021).

words of the 2019 Common Understanding of G7 Competition Authorities on Competition and the Digital Economy:

Competition law is flexible – it can and should adapt to the challenges posed by the digital economy without wholesale changes to its guiding principles and goals. The challenges of digital transformation require competition authorities to ensure that their specific tools, resources and skills form competition law enforcement are up-to-date.[20]

In the following paragraphs we will outline some methodological and normative aspects which lies behind or research.

2. An essential clarification: Policy v. politics

One aspect that will lie behind every discourse about competition law, especially when referred to big corporations such as the digital companies, might involve a sort of 'political' flavour. In fact, during the 2018 G7 meeting in Canada, former U.S. President Donald Trump, referring to Commissioner Vestager and EU DG Comp's investigations into Google, told former EU Commission Chair Jean-Claude Juncker 'Your tax lady, she really hates the U.S.'.[21] Moreover, commentators like James Pethokoukis, fellow at the conservative-winged American Enterprise Institute, stressed that the EU, in investigating and sanctioning Google, has applied its competition rules under a veil of protectionism, adding that it will be difficult to find an EU big tech company investigated or sued in the U.S., because there are not big EU tech companies.[22] Of course these claims cannot deserve too much attention,

[20] Common Understanding of G7 Competition Authorities on 'Competition and the Digital Economy', Paris, 5 June 2019, available at https://www.autoritedelaconcurrence.fr/sites/default/files/2019-07/g7_common_understanding.pdf (accessed 1 February 2021).

[21] See, *inter alia*, P. Kirby, *Margrethe Vestager – Denmark's EU 'tax lady' taking on corporate giants*, BBC News, 18 July 2018, available at https://www.bbc.com/news/world-europe-32410052 (accessed 6 February 2021) and J. Rankin, *Google fined £3.8bn by EU over Android antitrust violations*, The Guardian, 18 July 2018, available at https://www.theguardian.com/business/2018/jul/18/google-faces-record-multibillion-fine-from-eu-over-android (accessed 6 February 2021).

[22] J. Pethokoukis, *Europe's idiotic war on Google*, The Week, 19 July 2018, available at https://theweek.com/articles/785500/europes-idiotic-war-google (accessed 6 February 2021); S. Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, The Chinese

because, in the words of Luigi Zingales, *there is reliable evidence that the European Commission does not target American companies: It is just as tough with all firms, including domestic ones*.[23] Indeed, the case recording of the EU Commission's DG Comp, generally, without specific reference to the tech field, can easily sustain Zingales' observation. More interestingly, Zingales, in the following paragraph of the reported article in The New York Times, argues that thinking about a protectionist and politically oriented competition law enforcement in Europe may be dangerous for Americans, because it *deflect from asking the real important question: Is there something wrong with American antitrust?*[24] This view seems sustained by the claim issued by, *inter alia*, authors like Stucke and Grunes or Wu, who criticized lax antitrust enforcement in the U.S. after the Chicago School 'revolution'.[25]

Moreover, the strong political influence of competition law enforcement can be inferred also by the declarations made by the candidates to the U.S. Presidency during the last election campaigns. On 16 May 2017, reminding her speech at the *Center for American Progress Ideas Conference*, Senator Elizabeth Warren posted on her Twitter account that *It is time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again*. In 2019 the same Senator Warren proposed her recipe for breaking up big tech companies.[26] Consistently stated Senator Bernie

University of Hong Kong, Faculty of Law, Research Paper No. 2018-09, 2018, 16-18, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3245865_code903438.pdf?abstractid=3245865&mirid=1.

[23] L. Zingales, *How E.U.'s Google Fine Explains High Cellphone Costs in the U.S.*, The New York Times, 24 July 2018, available at https://www.nytimes.com/2018/07/24/opinion/european-union-google-fine-monopoly.html (accessed 6 February 2021); See also S. Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, n. 21, 17.

[24] L. Zingales, *ibidem*.

[25] M.E. Stucke and A. Grunes, *Big Data and Competition Policy*, n. 5, 232-255; T. Wu, *The Curse of Bigness*, cit., 109-121.

[26] B. Kendall and J. Schlesinger, *Elizabeth Warren Calls for Breakout of Amazon, Google, Facebook*, The Wall Street Journal, 8 March 2019, available at https://www.wsj.com/articles/elizabeth-warren-calls-for-breakup-of-amazon-google-facebook-11552065735 (accessed 6 February 2021); J. Pramuk and T. Higgins, *Sen. Elizabeth Warren pushes to break up big tech companies like Amazon and Facebook*, CNBC, 8 March 2019, available at https://www.cnbc.com/2019/03/08/elizabeth-warren-pushes-to-break-up-companies-like-amazon-and-facebook.html (accessed 6 February 2021).

Sanders.[27] On the other side of the field, former President Donal Trump, during the 2016 campaign, stated that Amazon has a *huge antitrust problem.*[28]

The opinions and statements reported above suggests that competition legislation and the consequent decisions may have political reflections or consequences. However, in our view and for the sake of our work, we will separate the spheres of politics and policy, although we cannot ignore the interdependency that they have in every field of law.

According to the Oxford English Dictionary, *politics*, for our purposes, means *the assumptions or principles relating to or underlying any activity, theory, or attitude, esp. when concerned with questions or power and status in a society*. Differently, *policy* is defined as *a principle or course of action adopted or proposed as desirable*. Given the reported definition, it seems like these two concepts are linked, but deeply different. While *politics* is more concerned with the ideal aspects which define an activity, *policy* refers mainly to a practical level, *i.e.*, it makes politics into practice. Using a metaphor, if *politics* is the raw fabric, *policy* may be seen as the tailored suit.

Indeed, reconciling the trade-off between the vagueness of politics and the technocratic wave that affects today's antitrust discourse[29] may result helpful for the purpose and the outcomes of our analysis. Indeed, as suggested by Baker, a future development of antitrust shall recognise *the political context of antitrust while simultaneously embracing the central role of economics in the field*.[30] In order to better understand such arguments, we deem useful identifying three moments

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[27] *U.S. presidential candidate Bernie Sanders takes aim at corporate media, tech giants*, Reuters, 27 August 2019, available at https://www.reuters.com/article/us-usa-election-sanders-idUSKCN1VH25E (accessed on 6 February 2021).

[28] *Trump says Amazon.com has 'a huge antirust problem'*, Reuters, 13 May 2016, available at https://www.reuters.com/article/us-usa-election-trump-amazon-com-idUSKCN0Y4075 (accessed 6 February 2021).

[29] See, *inter alia*, D.A. Crane, *Technocracy and Antitrust*, Texas Law Review, 2008, 86, 6, 1159. Critically, S. Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, The Yale Law Journal Forum, 4 June 2018, 989 available at https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf; H. First and S.W. Waller, *Antitrust's Democracy Deficit*, Fordham Law Review, 2013, 81, 5, 2544, available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr.

[30] H. First and S.W. Waller, *Ibidem*; J.B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 2013, 81, 5, 2196, available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4881&context=flr.

when politics and policy shall interact. These three steps are 1. Setting of entitlements; 2. Definition of an effective policy; 3. Enforcement. Number 1 represent what Calabresi and Melamed define as *the first issue which must be faced by any legal system*.[31] Indeed, setting the entitlement, *i.e.*, *decide which side to favor*[32] is essential in order to define a proper legal rule. Calabresi and Melamed group entitlements into three main cathegories: *economic efficiency, distributional preferences, and other justice considerations*.[33] It seems clear how such figures may work well also as competition law entitlements. However, setting the aims that a body of law shall pursue is an eminently *political* activity, based on the democratic process and the relevant constitutional background. The following step, *i.e.* number 2, is, starting from the abovementioned entitlements, defining a comprehensive policy, which may prove effective and applicable. In this activity the political and the policy dimensions are sublimated, because technicians shall find the better policy tools and solutions to render the political entitlements effective. Phase 3 is eminently technical, because during the enforcement of laws, there shall be no room for political considerations, which may derail the certainty of law. The proposed construct shows how politics and policy, *i.e.* the democratic and the technocratic dimension, can cohabit into competition law. What is necessary to note is that these two sides of competition law are essential. In our work we will try to balance these dimensions of competition law: In the first part we will concentrate on the goals (policy side) of competition law, while in the second part we will focus on the possible adjustments to the current toolbox of competition law authorities (technical side). However, it is worth pointing out that the present work aims at understanding the value dimension of competition law by promoting some policy objectives, which – if we take into account the definition reported above – shall be regarded as separated from the mere political discourse. This specification is of particular importance, as the policy aspects of law are essential in order to understand a particular system. Anyhow, the researcher – and so do we – ought to carry out an analysis of the policy aspects which is not influenced by the political – *i.e.*, related

[31] G. Calabresi and A.D. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Harvard Law Review, 1972, 85, 6, 1090.
[32] *Ibidem*.
[33] *Ibidem*, 1093.

to political parties – discourse. Therefore, the scope of this work is to investigate which policy values should lie behind competition provisions and what tools are adequate to enforce such values. This analysis is of particular importance, as the technical side of the law needs to be legitimated from a policy standpoint in order to serve its very purpose.

3. Constitutional background

With particular reference to the entitlement-setting phase which shall define what are the main goals of competition policy and enforcement, we made reference to the constitutional background that shall guide the research of the mentioned *entitlements*. We are now facing new problems, like digitalisation or environmental protection, but our societies, with special reference to the EU context, does not lack the necessary framework. What is needed is only the correct the lens that can help us in seeing such underlying constitutional framework and in linking to competition policy's *entitlements* the principles it contains. Moreover, and in order to better understand this point, we shall remind that competition rules are not a system which lives of its own light. If Europe is concerned, competition law provisions are part of the member States' legal systems, which must comply with the underlying constitutional values.[34] The same applies to EU law, which shall be adherent to the founding principles contained in the Treaties and the provisions included in the Charter of Fundamental Rights of the European Union.[35] Moreover, and remarkably, in these systems there is no space for an absolute and excessive *laissez-faire* approach, as well as environmental considerations shall be taken into account. In the course of our analysis, we will analyse every pertinent constitutional or

[34] It is interesting to note that the same Court of Justice affirmed, although with reference to the right to property, that it *is bound to draw inspiration from constitutional traditions common to the Member States*. See European Court of Justice, decision 13 December 1979, case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, para 15.

[35] The Charter of Fundamental Rights of the EU was solemnly proclaimed by the European Parliament, the Council and the Commission on 7 December 2000 in Nice. However, it entered into force only on 1 December 2009, together with the Treaty of Lisbon. According to Article 6, point 1, TEU, the Charter has the same legal value as the Treaties. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016P/TXT&from=EN (accessed 6 February 2021).

Treaty provision upon which a *multi-value* approach to competition law can be built.

Finally, it is also worth underlining that a theoretical foundation for a more *progressive* competition law can be deducted by John Rawls' *A Theory of Justice*.[36] In his work, Rawls elaborates a new contractualism-oriented scheme of principles – based on the game theory – which shall promote both the individual and the collective wellness. In a nutshell, Rawls suggest that, before setting the values for a society, individuals must imagine to be under a veil of ignorance with regard to their future conditions. As a consequence, they will establish a principle of equality, according to which every individual holds the same liberties, and a principle of difference, which, however, allows only inequalities that favours the redistribution of wealth. From this brief explanation, it seems clear how Rawls' theory shapes the foundations for a redistributive structure of society.[37]

4. Methodology and materials

The present research has been conducted and it will be presented under a comparative perspective. Although, according to the OECD, today more than 125 countries have an antitrust legislation in place,[38] it is well established that the U.S. and the EU systems represent the main competition law models in the world.[39]

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[36] J. Rawls, *A Theory of Justice*, Belknap Press of Harvard University, 1971.

[37] See, *inter alia*, introduction to Rawls' thought provided by the *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/rawls/#:~:text=Rawls%20holds%20that%20justice%20as,in%20modern%20political%20thought%3A%20utilitarianism (accessed 6 February 2021) and by the Treccani *Dizionario di filosofia*, available at https://www.treccani.it/enciclopedia/john-rawls_%28Dizionario-di-filosofia%29/ (accessed 6 February 2021). With reference to competition law, Rawls' theories are brilliantly expressed in I. Lianos, *Competition law as a form of social regulation*, The Antitrust Bulletin, 65, 2020, 28-31.

[38] *OECD Competition Trends 2020*, 3, available at http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf (accessed 7 February 2021).

[39] See, *inter alia*, E.M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, Nebraska Law Review, 2019, 98, 2, 299, available at https://core.ac.uk/download/pdf/286364341.pdf (accessed 7 February 2021). See also W.J. Kolasky, *U.S. and EU Competition Policy: Cartels, Mergers and Beyond*, Address before the Council for the United States and Italy, Bi-Annual Conference, New York, 25 January 2002, available at https://www.justice.gov/atr/speech/us-and-eu-competition-policy-cartels-mergers-and-beyond (accessed 7 February 2021); W.E. Kovacic, *The United States and its future influence on global*

From a pure comparative method standpoint, we will first adhere to the first Trento Thesis[40] when scrutinizing the aims and the goals of competition law of both EU and U.S. systems. Therefore, our scope will be mainly driven by pure knowledge of the subject, by observing the two abovementioned regimes. Then, when we will deal with the more practical aspects regarding the application of competition law and the potential introduction of new tools, we will benefit from the comparative method by understanding which solution fits better in a given situation, thus relying in the interpretation advanced by Vittorio Denti.[41] However, it is worth underlining how the latter theory might be read as consequential in respect of the first Trento Thesis, as knowledge is the essential prerequisite in order to guide the research for the best policy model.[42]

Given that the concrete problems we are analysing are quite common worldwide, we will notice how in our field *the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results*.[43] As the previous citation clearly shows, we are referring to the functionalist comparative method as a means which will help our analysis.[44] We will notice that some differences of approaches to competition law are justified

competition policy, George Mason Law Review, 2015, 22, 5, 1157-1158, where the Author points out that *the EU-U.S. duopoly is giving way to an oligopoly*, available at http://www.georgemasonlawreview.org/wp-content/uploads/2015/10/22_5_Kovacic.pdf (accessed 7 February 2021). However, according to the same Author, the EU model seems prevalent, due to the civil law tradition present in most Countries that have introduced or are willing to introduce competition law regimes, see W.E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in X. Vives (Ed.), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome*, Oxford University Press, 2009, 315.

[40] The Trento Theses were elaborated in 1987 by leading comparative law scholars like R. Sacco, A. Frignani, A. Gambaro, P. Cendon and are available (in Italian) at http://www.jus.unitn.it/faculty/guida/tesi.html (accessed 8 February 2021). The first Trento Thesis states that *Comparative law, intended as a science, aims necessarily at the better knowledge of juridical data. Further tasks – for instance the promotion of a better legal or interpretative model – deserve the greatest consideration, but they represent a contingent purpose only of the comparative law research* (translation by the author).

[41] V. Denti, *Diritto comparato e scienza del processo*, Rivista di Diritto Processuale, 1979, 336-337. See R. Sacco, P. Rossi, *Introduzione al Diritto Comparato*, UTET, 2017, 11-13; G. Ajani, D. Francavilla, B. Pasa, *Diritto Comparato*, Giappichelli, 2018, 5.

[42] V. Varano, V. Barsotti, *La Tradizione Giuridica Occidentale*, Giappichelli, 2018, 12; V. Varano, *Vittorio Denti comparatista*, Rivista Trimestrale di Diritto e Procedura Civile, 2002, 3, 746-750.

[43] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Oxford University Press, 1998, 34-35.

[44] For an exhaustive reflection on the functionalist comparative method see M. Graziadei, *The functionalist heritage*, in P. Legrand and R. Munday (Eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, 100.

by particular aspects of the U.S. and EU legal tradition. Anyway, similarities among these competition law systems are present and will be useful for our analysis. This is partly motivated, quoting Zweigert and Kötz, by the fact that *developed nations answer the needs of legal business in the same or in a very similar way*.[45] Indeed, as pointed out by Graziadei, *by adopting this presumption* [the *praesumptio similitudinis*], *comparatists should be able to discover similarities and substitutes in the world's legal systems and, at the same time, check the results of our research*.[46]

Given this premise, it descends that our analysis will be conducted mainly as follows: On a first layer, which will be focused on the foundations of competition law, a parallel and compared analysis between the EU and the U.S. systems will be carried out, by scrutinizing the relevant legislation, Court decisions and scholar interpretation, which helped at defining the evolution of these competition law regimes. However, the focus on the two *main* competition law legislations will not impede to consider some noteworthy and interesting innovations brought by other systems, like the focus on public interest and inclusiveness issues promoted by South African competition law.[47]

When we will turn on the more practical layer of our analysis – *i.e.*, defining what tools are needed in order to shape a more 'sustainable' competition law regime – we will turn on a more operative level of comparison between the solutions adopted on the two sides of the Atlantic. Indeed, if reference is made, *inter alia*, to the digital sector, while in the EU some noteworthy actions have been taken by the EU Commission and by some national competition Authorities, in the U.S. the debate is still more limited to scholar opinions. As a consequence, while referring to the

[45] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, cit., 40.
[46] M. Graziadei, *The functionalis heritage*, cit., 103.
[47] South African Competition Act no. 89 of 1998, available at http://www.compcom.co.za/wp-content/uploads/2017/11/pocket-act-august-20141.pdf. See, for instance, the preamble or article 2. See also E.M. Fox, *Outsider Antitrust*, in T. Bonakele, E.M. Fox, L. Mncube (Eds.), *Competition policy for the new era: Insights from the BRICS Countries*, n. 15, 32-36; F.M. Scott Morton, *How Do You Enforce Antitrust Law in a Global Marketplace?*, Yale Insights, 16 June 2016, available at https://insights.som.yale.edu/insights/how-do-you-enforce-antitrust-law-in-global-marketplace#gref (accessed 7 February 2021); OECD, *Public Interest Considerations in Merger Control*, June 2016, points 31-33, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En (accessed 7 February 2021).

EU, we will focus more on the operative case decisions, while dealing with the U.S. scenario, we will rely more on the doctrinal debate, especially by analysing the solutions brought by the so-called *Neo Brandeisian* movement, which aims at promoting a more structuralist approach to competition law. Such a view, however, is facing obstacles in a scholar and judicial environment highly committed to an efficiency-driven model of competition law,[48] shaped upon the Chicago School theories.

Finally, interdisciplinarity plays an important role, due to the cross-fertilization among law, economics and their theoretical foundations that characterizes competition law. However, the reference to common features between legal and economic thinking does not imply that the work will be conducted under the law and economics school's influence. Although this school of thought might have played a role in the research, our approach is closer to the Brandeisian and ordoliberal thinking, due to their attention on the structure of the market and on tis contestability.[49]

5. Relevance of the research

The relevance and timeliness of the present work may be inferred by the above-described background of the research. Moreover, as noted by Petit, there is a widespread literature growing on the big tech topic, at the point that such books *have become a genre of their own. There is one for every taste, and in every airport*.[50]

Turning to a more concrete ground, the *start of this new decade* reference made by Commissioner Vestager in the speech we reported as opening of the present chapter, clearly shows how the issues we are analysing are central in the political agenda that shall be set for the future of competition law, and, under a broader perspective,

[48] For an exhaustive introductory overview of these opposed viewpoint see N. Petit, *Big Tech and the Digital Economy. The Moligopoly Scenario*, Oxford University Press, 2020, 6-27.
[49] For an exhaustive overview of the interaction between the Ordoliberal school of thought and EU competition law, see D.J. Gerber, *Law and Competition in Twentieth Century Europe*, Oxford University Press, 1998, 232-265.
[50] N. Petit, *Big Tech and the Digital Economy*, n. 56, 93-94.

our societies. Moreover, the reference made to the American electoral debate on antitrust demonstrates how shaping the future of competition law is not a European need only. From this timeliness presumption we can assume also the relevance of this research: Our societies, as mentioned above, are facing difficult challenges that can be turned into great opportunities, *i.e.* digitisation and the *green* transition. This policy shift is needed now, and it is necessary in order to reach a more sustainable and socially oriented economy. As a consequence, every policy tool shall play its part in managing such challenges, and competition law is included in this effort. Competition law Authorities, research centres and scholars have shown a great interest on inequalities, digitalisation and environmental protection, thus confirming the fundamental importance of research in this field.

This research will try to add its modest contribution in the debate about the evolution of competition law, by promoting a *multi-value* approach to this subject. Although several works have already been published, for instance focusing on privacy, big data and competition law, on the structure of digital markets or competition in the virtual environment,[51] our work will try to address such issues by focusing on the goals of competition law, in order to define an up-to-date set of principles that then can shape the toolbox needed for the *start of this new decade* and the forthcoming challenges.

5. Structure and scope

In a nutshell, the aim of the present work is to scrutinise if it is possible to provide a newly shaped and more sustainable level playing field to competition law, both at the goals and at the toolbox level. If, like Juillot de la Morandière did with the French Civil Code,[52] we are allowed to compare competition law to a building, it

[51] See, *inter alia*, M.E. Stucke, *Big Data and Competition Policy*, n. 5; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?*, n. 10; B. Mäihäniemi, *Competition Law and Big Data. Imposing Access to Information in Digital Markets*, Edward Elgar, 2020; N. Petit, *Big Tech and the Digital Economy*, n. 56; A. Ezrachi and M.E. Stucke, *Virtual Competition. The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, 2016.

[52] L. Juillot de la Morandière, *The Reform of the French Civil Code*, University of Pennsylvania Law Review, 1948, 97, 1, 6.

now seems like an old architecture, which was futuristic when projected and it is still fit for usage, but its architectural beauty is now affected by the decades, as new architectural works (out of metaphor, the new challenges listed above) have contributed to show the inadequacy of such buildings for the new aesthetic trends. Of course, differently from Juillot de la Morandière's metaphor, competition law is not like *one of those old palaces, its facade mutilated, which always seems to be the seat of a governmental department*.[53] Competition law is still a good building, but it needs to be refurbished. Consequently, our aim is to research how the competition law building could be refurbished and restyled.

Apart from the present introduction and the conclusion, the work will be articulated into five other chapters:

Chapter 2 will better introduce the quest for a 'sustainable' competition policy, and it will focus on the current excessive market concentration problem and its consequences, like excessive and continuously growing income inequalities. In particular, statistics and observation on this issue will be reported and analysed.

Chapter 3 and 4 will analyse, respectively, relying on a comparative, historical and evolutionary perspective, the creation of U.S. antitrust law and EU competition law. The focus will be posed, in particular, on the goals of competition law on both sides of the Atlantic, in order to understand whether reforms aimed at rendering competition law more 'sustainable' may have a legal basis.

Chapter 5 constitutes the very empiric 'test' of our research. In particular, the concerns expressed in chapter 2 will be brought into practice, by analysing, in part I, the impact of digitalisation and the consequent structure of digital markets in the competition law scenario. Our focus will be mainly on monopolization cases under article 102 TFEU and Section 2 of the Sherman Act. The relevant case law will be analysed in order to find out whether the judicial decisions adopted are adequate for tackling the threat to competition represented by the so-called GAFAM (Google, Apple, Facebook, Amazon, Microsoft). The central role represented by data in this competitive pitch will be scrutinised together with the option for a

[53] *Ibidem*.

competition law enforcement more focused on non-price dimensions, like quality, especially related to privacy, and fairness. In such a context we will also rely on the reports issued recently by the major Competition Authorities on this topic.[54]

Chapter 5's part II will analyse what refinements are needed in the current competition law toolbox, by analysing alternative interpretations of present rules and also reforms which have introduced or are close to introduce new tools aimed at regulating digital markets, such as the new Section 19a added in January 2021 to the German GWB or the DMA Regulation recently enacted at the EU level.

Chapter 5's final part will be dedicated to private enforcement of competition law, which is seen as a means that can help reinvigorating competition law enforcement by also promoting the active role that citizens might play.

Finally, chapter 6 will deal with the changes needed by competition law in order to complain with the environmental goals that our societies are trying to achieve.

The conclusion will pull together all the themes analysed before and, by continuing our metaphor above, it will show the final project for the renewed competition law building.

As a final remark, it is worth noting that the refurbishment metaphor is not casual, because in a restructuring work the building and its load-bearing walls remain the same, as well as its main design, but it is the overall visible result that changes.

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[54] Joint report by the Bundeskartellamt and the Autorité de la Concurrence, *Competition law and data*, May 2016, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=A3F64F481FEF2A276E34398D5182E41E.1_cid387?__blob=publicationFile&v=2 (accessed 21 May 2021); Report by the UK Government, *Unlocking digital competition. Report of the Digital Competition Expert Panel (Furman Report)*, March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (accessed 19 May 2021); Report by the European Commission, *Competition policy for the digital era*, May 2019, available at https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1 (accessed 19 May 2021); Final report by the University of Chicago Stigler Center on antitrust and digital platforms, September 2019, available at https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf (accessed 19 May 2021); AGCM and Others, *Indagine conoscitiva sui big data*, cit.; U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (accessed 19 May 2021).

Coherently, our proposal, as it will be explained in this work, does not aim at eradicating the essential features of competition law. Contrarywise, we strongly believe that the main structure shall remain the same, but some adjustments have to be made, in order to be all, as a society, better off and, using Joseph Stiglitz's metaphor, not to leave small boats dashed on the rocks, while large yachts were lifted.[55]

[55] J.E. Stiglitz, *Inequality and economic growth*, in M. Mazzucato and M. Jacobs (eds.), Wiley Blackwell, *Rethinking Capitalism*, 2016, available at https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Inequality%20and%20Economic%20Growth.pdf (accessed 6 February 2021).

2

Inequality: A rising market power's by-product

We can either have democracy in this country or we can have great wealth concentrated in the hands of a few, but we can't have both.[56]

Starting from the premises and the prospected structure of the work outlined in the introduction, this chapter will first refer to the economic literature analysing the link between market power and inequalities. Empirical data will be used to demonstrate our concern about excessive market power and inequalities, so as to understand whether a 'sustainable' approach to competition policy may provide a better societal outcome.

1. The rise of inequality

[56] Justice Louis D. Brandeis, cited by C. Pazzanese, *The costs of inequality: Increasingly, it's the rich and the rest*, The Harvard Gazette, 8 February 2016, available at https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-increasingly-its-the-rich-and-the-rest/ (accessed 19 March 2021); W.M. Cole, *Poor and powerless: Economic and political inequality in cross-national perspective*, 1981-2011, International Sociology, 2018, 33, 3, 357.

Inequality has played a prominent role in the competition law discourse after the publication of seminal papers such as, by citing only a few, *Occupy Wall Street and Antitrust* by Professor Stucke,[57] *Market Power and Inequality* by Lina Khan and Sandeep Vaheesan[58] and *Antitrust, Competition Policy, and Inequality*, by Jonathan B. Baker and Steven C. Salop.[59] The quest for a different approach to competition law, less technocratic and also focused on factors such as inequality, stems from the recognition of a link between market power – which is one of the main concerns of competition law – and income inequality or income distribution. It is obvious that the economic crisis might be seen as the starting point of this debate. To be clear, as we will see, reference will be made to concentration of economic power occurred also before the economic downturn, but this moment and its consequences can be identified as the *casus belli*, *i.e.* when it became clear that some reflections on our economic systems were needed. However, it is not here the place to argue for different economic ideas or approaches, that is a task for politicians or philosophers. In our work we will scrutinise, from a technical viewpoint, based on data, if there is a link between market power, poverty and income inequality. Once established such a link, we will explore if competition law has a role to play in this realm.

First of all, we should ask why investigating the impact of inequality and market concentration may be beneficial or however needed in the competition law discourse. Indeed, this field of law is now seen as an efficiency enhancing policy, as a cornerstone of market economy and free market.[60] As we will see, members of the Chicago School sustain their *laissez faire* approach by arguing that markets will naturally self-correct. In this context, competition law should play only a residual role and it is seen as inadequate and inappropriate in tackling inequality or other

[57] M.E. Stucke, *Occupy Wall Street and Antitrust*, Southern California Law Review Postscript, 2012, 85, 33; also University of Tennesse College of Law Research Paper no. 179, 2012, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2002234_code258113.pdf?abstractid=2002234&mirid=1 (accessed 6 March 2021).
[58] L. Khan and S. Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontent*, Harvard Law & Policy Review, 2017, 11, 235.
[59] J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, Georgetown Law Journal, 2015, 104, 1.
[60] I. Lianos, *Competition Law as a Form of Social Regulation*, The Antitrust Bulletin, 2020, 65(I), 4-5.

social issues.[61] Of course, it is well recognised that a certain degree of inequality is essential for a market economy, as a driver for investments, innovation or, more generally, efforts for achieving a better status. However, we all know that a medicine is beneficial in case of disease until an abuse of such a medicine occurs. This point is well developed in the *Competition Overdose* theory developed by Stucke and Ezrachi.[62] Equally, if a certain degree of inequality – which can be viewed as a daily therapy for our economy – is necessary to keep our economies fit and dynamic,[63] an excessive intensity of such a therapy may undermine our economic system.[64] Consequences are economic downturns, the rise of poverty, the

[61] D. Crane, *Antitrust and Wealth Inequality*, Cornell Law Review, 2016, 101, 5, 1171. The Author argues, *inter alia*, that *the relationship between market power […] and income distribution is subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize. […] It is virtually impossible to calculate the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement* (p. 1174). The Author concludes his article by stating that *wealth equality does not belong to antitrust law's domain* (p. 1228). See also C. Shapiro, *Antitrust in a time of populism*, International Journal of Industrial Organization, 2018, 61, 714, who sustains that *antitrust is poorly suited to address issues of income inequality. Many other public policies* [including tax policy] *are far superior for this purpose* (p. 717) and concludes that *trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire* (p. 746). See also D.D. Sokol, *Antitrust, Industrial Policy, and Economic Populism*, in D. Gerard and I. Lianos (Eds.), *Reconciling Efficiency and Equity. A Global Challenge for Competition Policy*, cit, 281, who argues that *antitrust is not within* the *set of tools* necessary to reach *broader public policy goals such as inequality and fairness* (p. 290). See also, although implying, in the form of "aggregate justice", an indirect link between the competitiveness of markets and inequality, G. Amato, *Non tocca all'antitrust*, in *Tavola rotonda su J.B. Baker e S.C. Salop, Antitrust, politica della concorrenza, e disuguaglianza*, Mercato Concorrenza Regole, 2016, 1, 145.

[62] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit.

[63] Correctly, in our view, Kaldor wrote of *satisfactions that are derived from the prospect of improving one's income by one's own efforts – a prospect which is necessarily excluded when a regime of complete equality prevails*. See N. Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, The Economic Journal, 1939, 49, 195, 551. See also the introductory explanation given by P. Aghion, E. Caroli, C. García-Peñalosa, *Inequality and Economic Growth: The Perspective of the New Growth Theories*, Journal of Economic Literature, 1999, 37, 4, 1615.

[64] In this sense, Professor Stiglitz affirms that the idea that inequality is good for growth is *fallacious*. See J.E. Stiglitz, *The Price of Inequality*, cit., 106. On the relationship between inequality and economic growth see also the research by F. Hasanov and O. Izraeli, *How Much Inequality is Necessary for Growth?*, Harvard Business Review, 2012, available at https://hbr.org/2012/01/how-much-inequality-is-necessary-for-growth# (accessed 8 March 2021). The Authors point out that *the gains from rises in inequality are murky: Although our findings suggest that modest increases can generate growth, other data indicate that heightened inequality shortens growth spells and may halt growth. Reducing inequality, though, has clear benefits over time: It strengthens people's sense that society is fair, improves social cohesion and mobility, and broadens support for growth initiatives. Policies that aim for growth but ignore inequality may ultimately be self-defeating*. Also P. Aghion, E. Caroli, C. García-Peñalosa, *Inequality and Economic Growth: The Perspective of the New Growth Theories*, cit., 1615, point out how some studies found a negative correlation between a certain degree of inequality and average growth rate.

advent of populist ideas[65] and, as an extreme consequence, a serious *vulnus* to our democratic system.[66] Therefore, fairness shall play a more important role while thinking about our economic system, although, in the words of Binmore, such a concept is often ignored by economic literature, too keen at promoting the *myth that there is a necessary trade-off between equity and efficiency*.[67] Indeed, traditional welfare economics sustains a sort of separation between efficiency and redistributive ends.[68] In particular, according to the Kaldor-Hicks efficiency theory, allocation of resources is efficient whether the relevant benefits outweigh costs. In a nutshell, while a solution will be Pareto efficient when at least one person is made better off, and nobody is left worse off – a situation which is unlikely to occur in the real world[69] – according to the Kaldor-Hicks theory it will be efficient if the parties who are better off could, in theory, compensate those who are made worse off.[70] Anyhow, such a compensation might not occur in reality.[71] Focusing on the overall efficiency gains and not on distributive justice's problems is – as we mentioned above – a characteristic of welfare economics.[72] Anyway, alternative economic thinking seems to take into deeper consideration the issue of inequality, thus not relegating it to be a necessary efficiency's by-product.[73] The masterpiece from Thomas Piketty, for instance, argues that, given the exceeding return of

[65] I. Lianos, *The Poverty of Competition Law. The Short Story*, in D. Gerard and I. Lianos (Eds.), *Reconciling Efficiency and Equity. A Global Challenge for Competition Policy*, Cambridge University Press, 2019, 79. See European Investment Bank, *Inequality in Europe*, January 2018, 34, available at https://www.eib.org/attachments/efs/econ_inequality_in_europe_en.pdf (accessed 10 March 2021).
[66] J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, cit., 8.
[67] K. Binmore, *Natural Justice*, Oxford University Press, 2005, 66.
[68] J.R. Hicks, *The Foundations of Welfare Economics*, The Economic Journal, 1939, 49, 196, 711-712; I. Lianos, *Competition Law as a Form of Social Regulation*, cit. 62-63.
[69] See the item 'Pareto efficiency' in the *Oxford Dictionary of Business and Management*, Oxford University Press, 2009.
[70] N. Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, cit., 550. See also the item 'Kaldor-Hicks efficiency' in the *Oxford Dictionary of Finance and Banking*, Oxford University Press, 2008.
[71] J.R. Hicks, *The Foundations of Welfare Economics*, The Economic Journal, 1939, 49, 196, 711-712; I. Lianos, *Competition Law as a Form of Social Regulation*, cit. 63; I. Lianos, V. Korah, P. Siciliani, *Competition Law*, Oxford University Press, 2019, 91.
[72] I. Lianos, *Competition Law as a Form of Social Regulation*, cit. 63. The evolution of the scholar debate regarding inequality and growth is well summarised in the abovementioned report by the European Investment Bank, *Inequality in Europe*, cit., 7-9.
[73] K. Binmore, *Natural Justice*, cit., 117, for instance, in sustaining the idea that fairness shall guide the selection of more efficient equilibria in a *fair social contracts* perspective, argued that *the idea that some trade-off between equity and efficiency is necessary makes no sense at all*. See also I. Lianos, *Competition Law as a Form of Social Regulation*, cit., 67.

capital's rate over growth's rate, wealth tends to accumulate in the hands of the wealthiest people, thus increasing inequality ($r > g$).[74] Moreover, according to Piketty, this growing inequality may lead to negative consequences on growth and also on the meritocratic and democratic values of our societies.[75] Given the abovementioned formula, Piketty argues that inequality seems to be an inherent effect of the capitalist structure of our economy (the *divergence force r > g has nothing to do with any market imperfection*)[76] and that taxation can address this feature, in particular the *useful utopia* of a global tax on capital[77] may reduce inequality and its side-effects.[78]

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[74] T. Piketty, *Capital in the Twenty-First Century*, Harvard University Press, 2014, 33-34. We generally refer to levels of 'income', which is the flow of money that households receive. Here we mentioned 'wealth' because is central in Piketty's reasoning, although wealth represents a more static and different concept, that is, in a nutshell, the disposable property of a household (i.e., money in a bank account, real property, etc.). For a deeper insight on the distinction between 'income' and 'wealth' in measuring inequality see B. Keeley, *Income Inequality: The Gap between Rich and Poor*, OECD Insights, OECD Publishing, 2015, 19-20. Support for Piketty's work has been expressed also by, *inter alia*, a leading scholar like Nobel Prize in Economics laureate (1987) R.M. Solow, *Thomas Piketty is Right*, The New Republic, 23 April 2014, available at https://newrepublic.com/article/117429/capital-twenty-first-century-thomas-piketty-reviewed (accessed 10 March 2021). Solow here, defined the ever-increasing gap between wealth people and the rest of the population as an *ominous anti-democratic trend*. He then explained Piketty's main argument (which defines the *rich-get-richer dynamic*) in a workable manner, that we would like to propose: *as long as the rate of return exceeds the rate of growth, the income and wealth of the rich will grow faster than the typical income from work*.

[75] T. Piketty, *Capital in the Twenty-First Century*, cit., 34, 746.

[76] *Ibidem*, 35 and 748. In particular, when r > g *capitalism automatically generates arbitrary and unsustainable inequalities* (p. 1).

[77] *Ibidem*, 663.

[78] *Ibidem*, 663-699. The importance of the inequality issue treated in this chapter is revealed also by the recent proposal advanced both by the U.S. President Biden and the International Monetary Fund to increase taxes on high-income earners (A. Smith and K. Welker, *Biden says he plans 'small to significant' tax hike for those making over $400,000*, NBC News, 17 March 2021, available at https://www.nbcnews.com/politics/joe-biden/biden-says-he-plans-small-significant-tax-hike-those-making-n1261292 (accessed 17 March 2021); M. Henney, *Biden's proposed tax hike could hit Americans earning $200,000*, Fox Business, 18 March 2021, available at https://www.foxbusiness.com/economy/bidens-proposed-tax-hike-could-hit-americans-earning-200000 (accessed 19 March 2021); E. Stewart, *Joe Biden's tax plan, explained*, Vox, 18 March 2021, available at https://www.vox.com/policy-and-politics/22336892/joe-biden-tax-hike (accessed 19 March 2021). Likewise, the International Monetary Fund proposed a tax on high income or wealth earners to cover the costs of the current pandemic, see L. Elliott, *IMF calls for wealth tax to help cover cost of the Covid pandemic*, The Guardian, 7 April 2021, available at https://www.theguardian.com/business/2021/apr/07/imf-wealth-tax-cost-covid-pandemic-rich-poor (accessed 7 April 2021)), as suggested not only by Piketty, but also by A.B. Atkinson, *Inequality. What Can Be Done?*, Harvard University Press, 2015, 179-204. Moreover, a proposal partially in line with Piketty's suggestion appears close to become reality. Indeed, a worldwide taxation of multinational firms was a priority of President Biden and recently an agreement at the OECD level has been reached over a proposal providing for a minimum worldwide tax of 15 percent on multinational companies. Furthermore, this scheme would include also an obligation to pay this tax where firms earn their profits and not only where they are incorporated. Such a move will of course

On the same wave about the perils of growing inequality are authors such as Lianos, the current chair of the Hellenic Competition Authority, who pointed out that *the current level of inequality (and poverty) and the fact that this is rising (at least in developed countries) is judged alarming, and is considered to impose a 'price' to society, in terms of lower efficiency, productivity, and social stability*.[79] This Author calls for an *active competition policy* in order to tackle such issues.[80] Of particular interest is the link between inequality, poverty and lower efficiency, as Chicagoans see competition law as an efficiency enhancing policy. This concept is perfectly articulated by Nobel Prize for Economics laureate (2001) Professor Stiglitz, which defined inequality – in a manner as much simple as effective – as *an increasing gap between the top and the rest*.[81] Professor Stiglitz sustains that our society is paying *a high price for our large and growing inequality, and because our inequality is likely to continue to grow – unless we do something – the price we pay is likely to grow too. Those in the middle, and especially those at the bottom, will pay the highest price, but our country* [in his work, the U.S.] *as a whole – our society, our democracy – also will pay a very high price*.[82] Then, about efficiency, it further points out that *widely unequal societies do not function efficiently, and their economies are neither stable nor sustainable in the long term*.[83] This also occur

impact mainly big tech companies, like Google or Facebook. Anyhow, although 130 Countries – including Italy, Germany and France – agreed with this proposal, other negotiations are needed and Countries such as Ireland, which plays an important role in this matter, did not adhered. Noteworthily, also the G20 held in Rome in October 2021 endorsed the Biden's minimum corporate tax proposal (K. Sullivan and K. Liptak, *Joe Biden gets a win on global taxes at his first G20 as President*, CNN, 30 October 2021, available at https://edition.cnn.com/2021/10/30/politics/joe-biden-g20-summit-saturday/index.html (accessed 31 October 2021); E. Helmore and agencies, *G20 leaders to endorse Biden proposal for a minimum corporate tax*, The Guardian, 30 October 2021, available at https://www.theguardian.com/world/2021/oct/30/g20-leaders-endorse-biden-global-minimum-corporate-tax (accessed 31 October 2021)). Therefore, the imminent future will tell us if something close to Piketty's proposal will become reality and the years to come will show if it could in practice – and probably it will – decrease income and wealth inequality (J. Horowitz, *President Biden wins global support for massive tax overhaul*, CNN Business, 1 July 2021, available at https://edition.cnn.com/2021/07/01/economy/global-minimum-tax-agreement/index.html (accessed 1 July 2021)).

[79] I. Lianos, *Competition Law as a Form of Social Regulation*, cit., 5; Also J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, cit., 5-6, argues that inequality *involves social costs* as well as it can *undermine the legitimacy of our social order*.

[80] I. Lianos, *Competition Law as a Form of Social Regulation*, cit., 71.

[81] J.E. Stiglitz, *The Price of Inequality*, cit., 104.

[82] *Ibidem*.

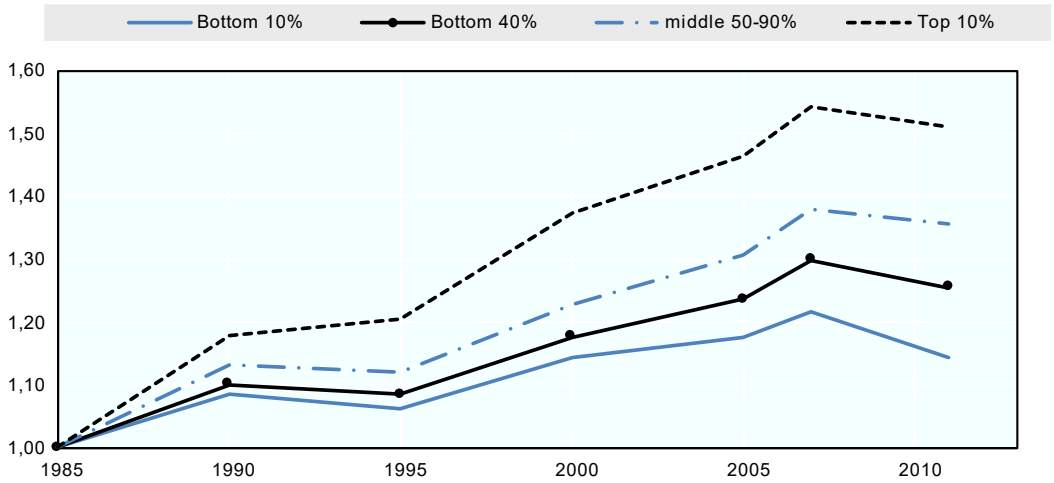
[83] *Ibidem*.

because the above described conditions lead to a lack of trust, but trust is deemed *essential for the functioning of our society*.[84]

Professor's Stiglitz work provided us a solid theoretical basis for understanding how inequality can detrimentally impact our economic and democratic systems. Furthermore, it is worth clarifying that the observations reported from *The Price of Inequality* are referred to the U.S. market and society. However, as data will show, to some extent these objections can also work – with some moderation – if referred to the European context. Therefore, we will now provide some data that will show the current rising tide of inequality, with the purpose of further developing our discourse by establishing a link between inequality and market power in paragraph 2 of the current chapter.

The analysis on the rising inequality can be started by reporting that according to an OECD study published in 2015, *since the 1980s, income inequality has risen in most OECD countries. A quarter of a century ago, disposable income of the top 10% of earners was on average around 7 times higher than that of bottom 10%; by 2010, it was around 9½ times higher*.[85] This trend is more clearly visible by means of a chart published by the same OECD, reporting a comparison of variations in income regarding the bottom 10%, the bottom 40%, the middle 50-90% and the top 10% of 17 OECD Countries[86] examined from 1985 to 2013:[87]

[84] *Ibidem*, 143.
[85] B. Keeley, *Income Inequality: The Gap between Rich and Poor*, cit., 32-33.
[86] Canada, Germany, Denmark, Finland, France, United Kingdom, Greece, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, New Zealand, Sweden and the United States.
[87] Reported in OECD, *In It Together: Why Less Inequality Benefits All*, OECD Publishing, 2015, 21, figure 2.1.

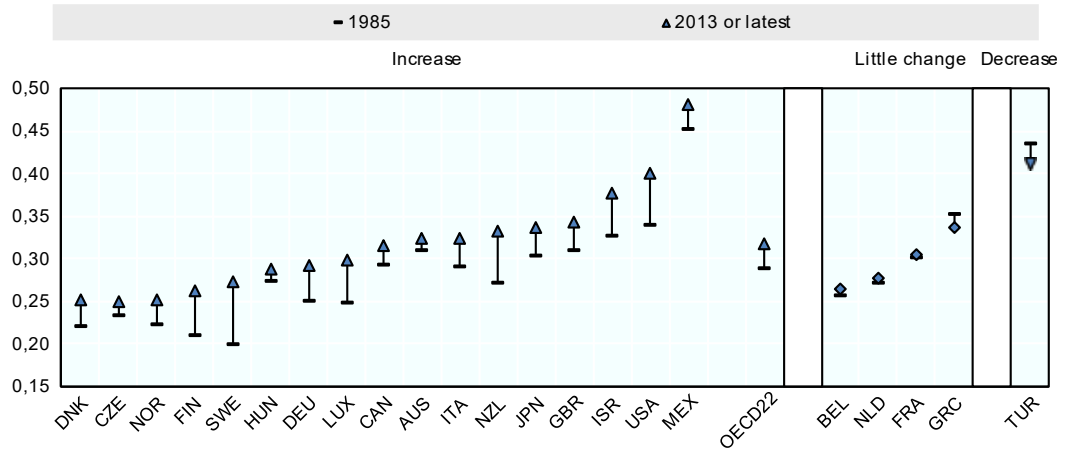


Source: *OECD Income Distribution Database, (IDD),* *www.oecd.org/social/income-distribution-database.htm*

The same OECD clearly summarised the increase of income inequality, based on the Gini coefficient,[88] across a number of OECD countries between mid-1980s and mid-2010s:[89]

[88] This coefficient for the representation of inequality has been introduced at the beginning of XX Century by the Italian economist Corrado Gini. It is based on values from 0 to 1: 0 represents a total equality scenario, where every society's member has the same income, whilst 1 represents a total inequality scenario, where one individual holds the total income. The values between 0 and 1 represents various among total equality and total inequality. Often, and for practical reasons, values between 0 and 1 are multiplied in order to express a range between 0 and 100. See B. Keeley, *Income Inequality: The Gap between Rich and Poor*, cit., 22. See also the item 'Gini coefficient' in the *Oxford Dictionary of Economics*, Oxford University Press, 2009, and in the Eurostat glossary, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Gini_coefficient (accessed 17 March 2021).

[89] Reported in OECD, *In It Together: Why Less Inequality Benefits All*, cit., 24, figure 1.3.



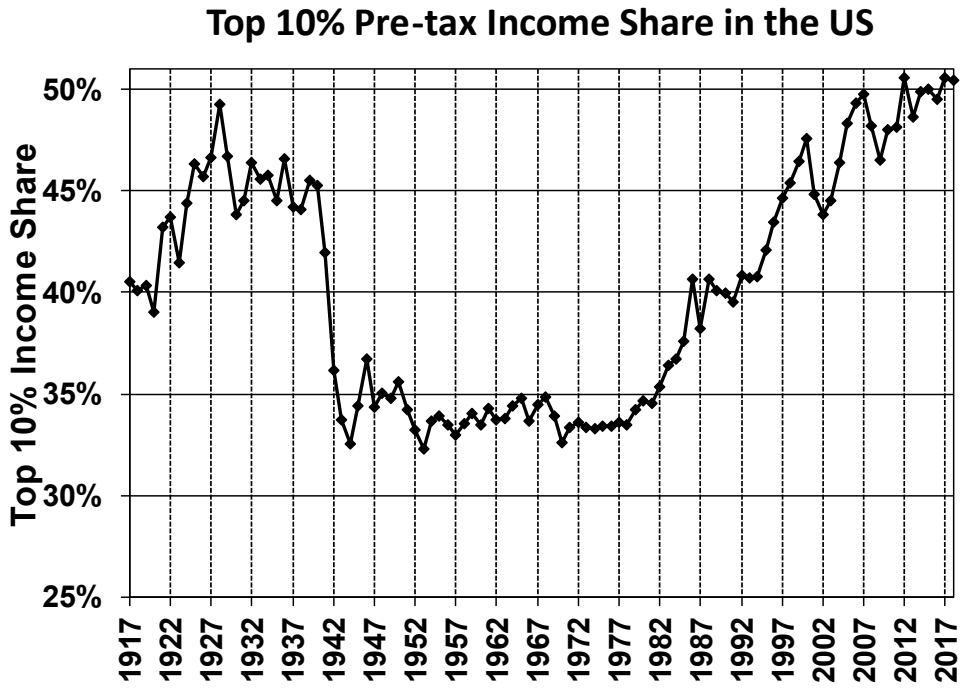
Source: *OECD Income Distribution Database, (IDD),* www.oecd.org/social/income-distribution-database.htm

The graph above shows that across the majority of OECD Countries surveyed income inequality between 1985 and mid-2010s has increased. In certain situations, such as those of the U.S. and Sweden, such an increase is significant, but also in Countries like Germany or Italy the increase cannot be ignored. It seems that only France, the Netherlands and Belgium kept income inequality's increase at a stable level during the analysed decades.

However, more generally, the OECD introduces its webpage on inequality by stating that *income inequality in OECD countries is at its highest level for the past half century. The average income of the richest 10% of the population is about nine times that of the poorest 10% across the OECD, up from seven times 25 years ago*.[90]

With particular reference to the U.S., data from the noteworthy work by Piketty and Saez, showed how the top 10% of population accounts for about 50% of pre-tax income. As the following graph shows, the share of capital by top 10%, which was very high just before World War II, dramatically decreased in 1940s and remained stable (around 33%) until 1980s. Then a rapid increase occurred from 1990s, reaching more than 50% in 2017:[91]

[90] http://www.oecd.org/social/inequality.htm (accessed 13 March 2021).
[91] T. Piketty and E. Saez, *Income Inequality in the United States, 1913-1998*, Quarterly Journal of Economics, 2003, 118, 1, Figure 1, tables and figures updated to 2018 in February 2020 available at



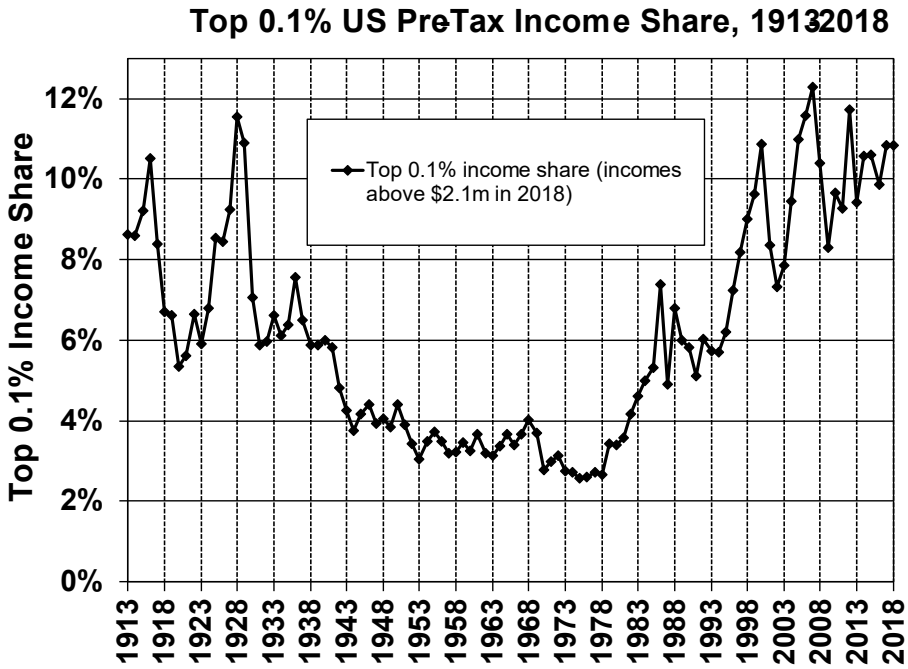
Source: Piketty and Saez, 2003 updated to 2018. Series based on pre -tax cash market income including realized capital gains and excluding government transfers.

In this figure, it is impressive to note, as Howard R. Gold did, that also the wealthiest 1% of the population has its 1%, that is the 0.01% of the American population.[92] As clearly showed by Piketty and Saez, the top 0.1 percent of American population now accounts for more than 10% of U.S. pre-tax income share:[93]

https://eml.berkeley.edu/~saez/TabFig2018.xls (accessed 15 March 2021). See also income inequality statistics by the United States Census Bureau, available at https://www2.census.gov/programs-surveys/demo/tables/p60/270/tableA3.xlsx (accessed 16 March 2021).

[92] H.R. Gold, *Never mind the 1 percent. Let's talk about the 0.01 percent*, Chicago Booth Review, 2017, available at https://review.chicagobooth.edu/economics/2017/article/never-mind-1-percent-lets-talk-about-001-percent (accessed 15 March 2021).

[93] T. Piketty and E. Saez, *Income Inequality in the United States, 1913-1998*, cit., Figure 3.



Source: Piketty and Saez, 2003 updated to 2018. Series based on pre -tax cash market income including or excluding realized capital gains, and always excluding government transfers.

Moreover, and impressively, as pointed out in 2020 by Saez and Zucman, the share of wealth[94] owned by the top 0.00001 percent Americans increased from 0.13 percent of total U.S. wealth in 1982 to 1.2 percent in 2020.[95] Such an élite, according to the mentioned Authors, is composed by the top shareholders of big and powerful listed corporations, such as the big techs.[96] This observation may cast some light on our debate around inequality and market concentration, that will be explored more deeply in paragraph 2 below.

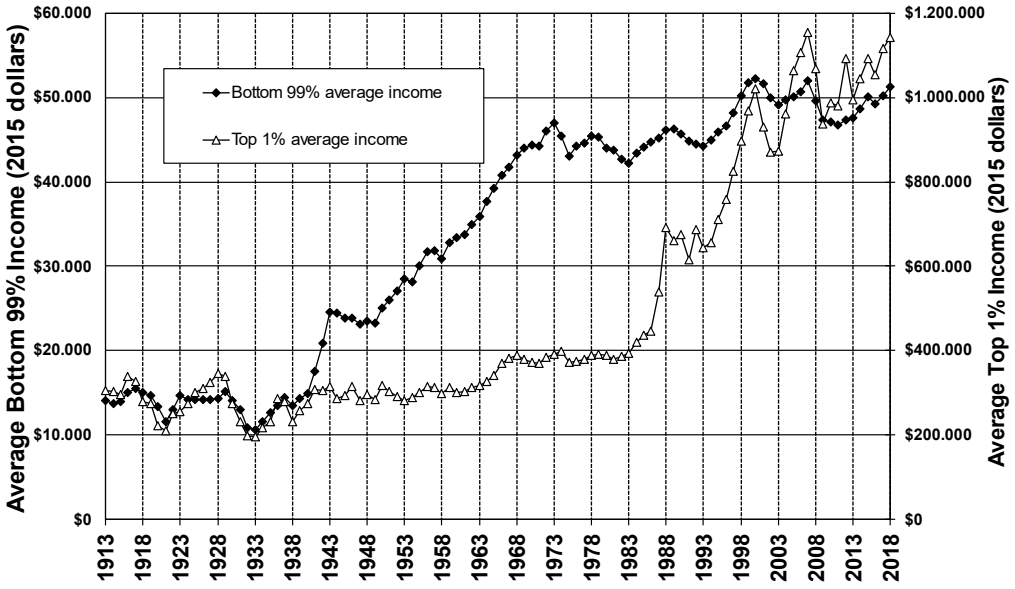
Another interesting finding by the same Authors shows how the average income of the bottom 99% and the top 1% in the U.S. remained mainly at the same level between 1913 (when the Authors' dataset starts) and about 1940. Then, the average income of bottom 99% increased significantly and steadily until 2000 and it was

[94] Although we generally refer to levels of 'income' inequality, here we mentioned 'wealth' because we found remarkably interesting this finding from Saez and Zucman (see the following footnote). For a deeper insight on the distinction between 'income' and 'wealth' in measuring inequality see footnote no. 74 above.

[95] E. Saez, and G. Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, Journal of Economic Perspectives, 2020, 34, 4, 10-11, available at https://eml.berkeley.edu/~saez/SaezZucman2020JEP.pdf (accessed 16 March 2021).

[96] *Ibidem*.

significantly higher than the average income of the top 1%, especially between 1943 and 1988. The top 1% average income remained stable (with a light increase) until 1988, when it increased rapidly. Afterwards, it almost paired the bottom 99% value around 2000 and it went beyond after 2003. Since then, it remained always above the bottom 99% result. It is also worth considering that now the average bottom 99% income is around $ 50,000, whilst the top 1% average income is quantifying between $ 1,100,000 and $ 1,200,000:[97]



Source: *T. Piketty and E. Saez, 2003 updated to 2018.*

The data showed above can be read in conjunction with the Federal Reserve Board's study that highlighted how a percentage around 30 and 37 percent would face financial difficulties in case of a $ 400 emergency expense.[98] About this finding,

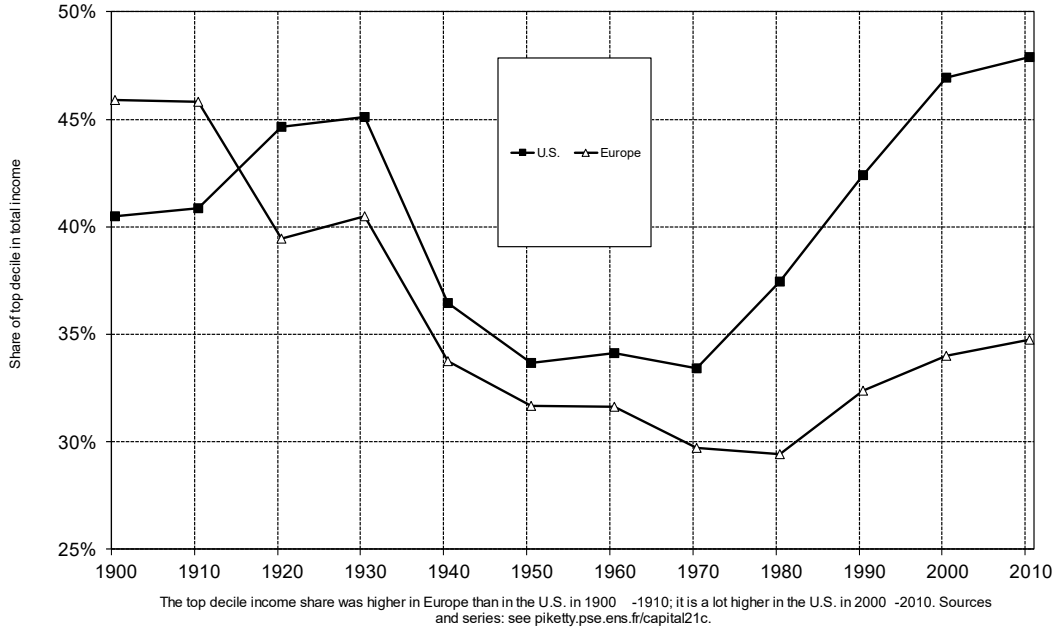
[97] T. Piketty and E. Saez, *Income Inequality in the United States, 1913-1998*, cit., Figure A1. It is worth adding that the subsequent Figure A1b, which adds capital gains to the average real income, points out an even more gap between the top 1% and the bottom 99%. Such a gap is particularly high after mid-1990s.

[98] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2019 – May 2020, Dealing with Unexpected Expenses*, available at https://www.federalreserve.gov/publications/2020-economic-well-being-of-us-households-in-2019-dealing-with-unexpected-expenses.htm (accessed 16 March 2021). This Report refers to 37 percent of American households, while the *Update on the Economic Well-Being of U.S. Households:*

Ezrachi and Stucke underlined how many U.S. households live an extremely precarious financial situation,[99] not being able of dealing with unexpected expenses.

However, although the U.S. situation about inequality seems to be much more debated, the European coast of the Atlantic Ocean is not immune from it. Indeed, as showed by Piketty, although U.S. values are dramatically higher, especially since 1970s, also in Europe income inequality registered a steady increase between 1980 and 2010, from 30% to 35%:[100]

Figure 9.8. Income inequality: Europe vs. the United States, 1900-2010



Source: *T. Piketty, Capital in the Twenty-First Century, cit.*

July 2020 Results, issued in September 2020, refers to 30 percent. However, changes in data seems to occur frequently around the mentioned percentages. The September 2020 update is available at https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-update-202009.pdf (accessed 16 March 2021). See, in particular, Table 4, p. 14.

[99] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 232-233.

[100] T. Piketty, *Capital in the Twenty-First Century*, cit., Figure 9.8, available at http://piketty.pse.ens.fr/files/capital21c/en/pdf/F9.8.pdf (accessed 16 March 2021).

As showed by Eurostat data about the distribution of national equivalised income, the top decile in 2019 held the 23.6% of national equivalised income in the EU (27 Countries, from 2020), whilst the hundredth percentile accounts for 5%.[101]

At the national level, the World Bank dataset shows how in 2017 the top decile earned 26,7 percent of the national income in Italy,[102] 25.8% in France,[103] 24.6% in Germany,[104] 26.7% in Portugal[105] and 25.4% in Spain.[106] These percentages are reported also by the United Nations Human Development Report 2020,[107] which shows also how in the same countries the richest 1 percent holds respectively the 8.7%, the 11.2%, the 12.5%, the 10.6% and the 11.9%.[108]

The UN Report indicates also a Gini coefficient of 35.9 for Italy, one of the highest of the EU,[109] whilst Gini coefficients among some EU countries are reported as follows: Germany 31.9, the Netherlands 28.5, Belgium 27.4, Slovenia 24.2, Spain 34.7, France 31.6, Greece 34.4, Poland 29.7 and Portugal 33.8.[110] The 41.4 Gini coefficient of the United States seems not so far for many EU Countries.

With a particular focus on Italy, the percentage of families which cannot cover unexpected expenses in 2019 was calculated by the Istat at 34.8%. This percentage in 2004 was significantly lower, at 27.3%. We cannot hide that a steady decrease

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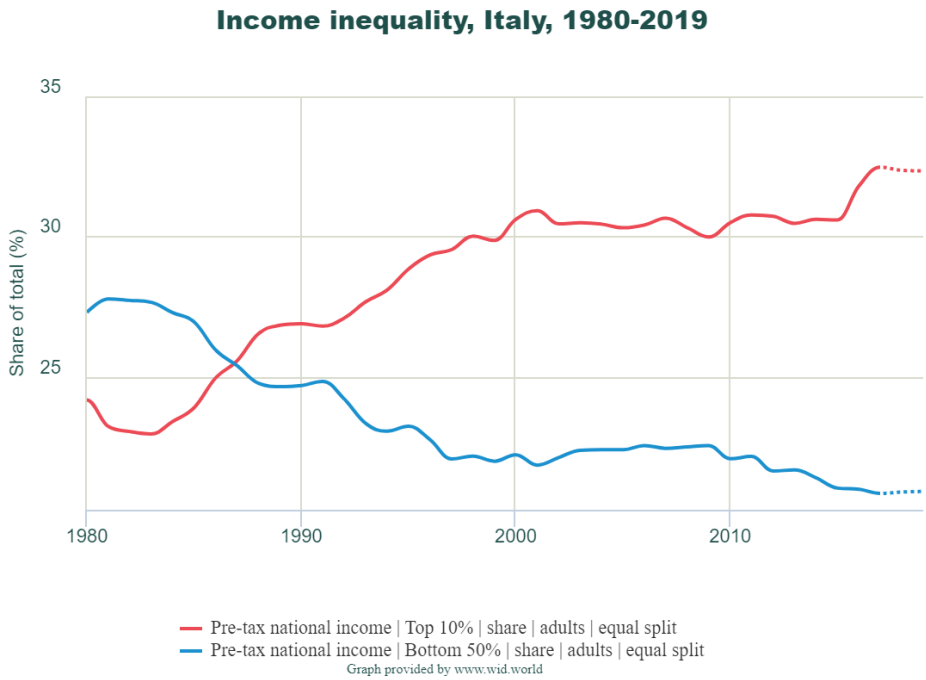
[101] Eurostat, *Distribution of income by quantiles – EU-SILC and ECHP surveys*, available at https://ec.europa.eu/eurostat/databrowser/view/ILC_DI01__custom_694576/default/table?lang=en (accessed 16 March 2021).
[102] World Bank, Income share held by highest 10%, Italy, available at https://data.worldbank.org/indicator/SI.DST.10TH.10?end=2017&locations=IT&start=1986&view=chart (accessed 16 March 2021).
[103] World Bank, Income share held by highest 10%, France, available at https://data.worldbank.org/indicator/SI.DST.10TH.10?end=2017&locations=FR&start=1986&view=chart (accessed 16 March 2021).
[104] World Bank, Income share held by highest 10%, Germany, available at https://data.worldbank.org/indicator/SI.DST.10TH.10?end=2017&locations=DE&start=1986&view=chart (accessed 16 March 2021).
[105] World Bank, Income share held by highest 10%, Portugal, available at https://data.worldbank.org/indicator/SI.DST.10TH.10?end=2017&locations=PT&start=1986&view=chart (accessed 16 March 2021).
[106] World Bank, Income share held by highest 10%, Spain, available at https://data.worldbank.org/indicator/SI.DST.10TH.10?end=2017&locations=ES&start=1986&view=chart (accessed 16 March 2021).
[107] United Nations, *Human Development Report 2020*, 2020, Table 3, available at http://hdr.undp.org/sites/default/files/hdr2020.pdf (accessed 15 March 2021).
[108] *Ibidem*.
[109] *Ibidem*.
[110] *Ibidem*.

occurred during the last few years, given that the index was at 41.9% in 2016.[111] However, we are discussing about high percentages for a developed economy. Similarly, Istat data shows that Italian families living in absolute poverty[112] have increased from 3.6% in 2005 to 6.4% in 2019, with a peak of 7% in 2018. Moreover, a preliminary study by Istat, issued in the context of the Covid-19 pandemic, has shown that in 2020 more than 2 million of Italian families were in absolute poverty, with a dramatic increase of 335,000 families in respect of 2019. Moreover, in the Istat's words, the slight improvements in the absolute poverty rate reported above have been *zeroized* by the pandemic.[113] The family absolute poverty index has indeed increased from 6.4 % to 7.7%. With reference to individuals, in 2020 the 9.4% of Italians was in absolute poverty, for a total number of 5.6 million over 60 million, one million more than in 2019.[114]

If we refer to income inequality in Italy, data from the World Inequality Database shows that from 1980 to 2019 it has increased dramatically:

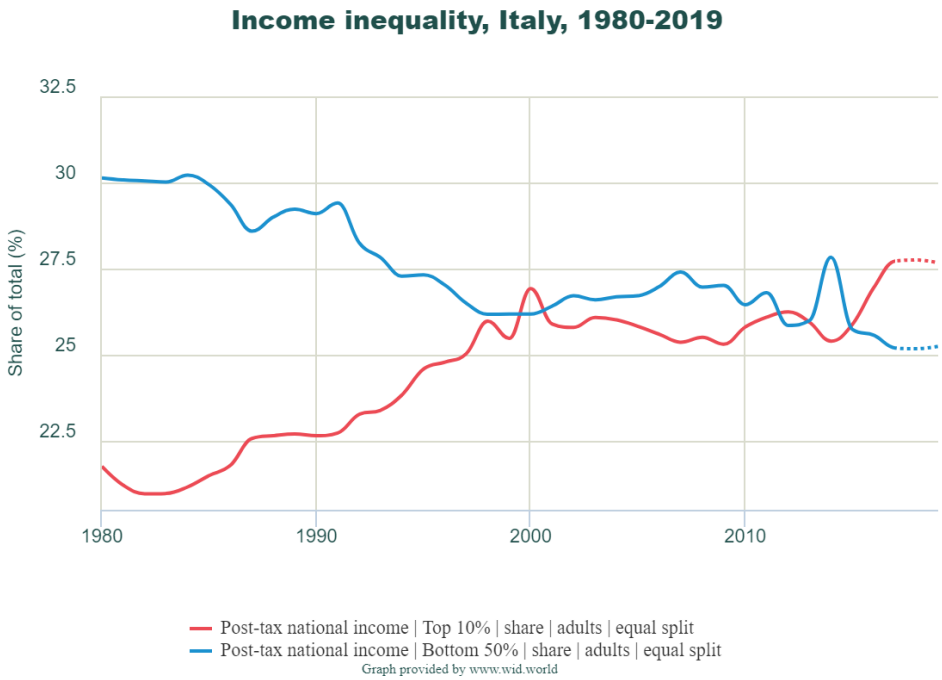
[111] See the Istat website at http://dati.istat.it/Index.aspx?QueryId=17944# (accessed 16 March 2021), where a plethora of datasets are available. In particular, an unexpected expense is calculated for each surveyed year as equivalent to 1/12 of the poverty threshold for the two previous years.
[112] According to Istat, absolute poverty defines a family with a consumption expense which is inferior to the monetary value of a set of goods which are considered essentials in order to avoid serious forms of social exclusion. See http://siqual.istat.it/SIQual/visualizza.do?id=8888914&refresh=true&language=IT (accessed 16 March 2021).
[113] Istat, *Nel 2020 un milione di persone in più in povertà assoluta*, 4 March 2021, available at https://www.istat.it/it/files//2021/03/STAT_TODAY_stime-preliminari-2020-pov-assoluta_spese.pdf (accessed 16 March 2021).
[114] *Ibidem*.



Source: *World Inequality Database, available at https://wid.world/country/italy/ (accessed 16 March 2021).*

Data shows, as a clear example of how tax measures cannot solve the problem by themselves,[115] how starting from 2015, also the post taxes income share of the top decile was superior to the post taxes income held by the bottom 50 percent:

[115] According to Lianos, *Competition Law as a Form of Social Regulation*, cit., 10, doubts may be cast over traditional progressive taxation means, due to the competition among jurisdictions for high-income taxpayers and for *loopholes in the taxation of international capital*. Tax competition is mentioned (in particular by focusing on the lack of fiscal coordination between the European Countries) also by T. Piketty, *Capital in the Twenty-First Century*, cit., 633-634, 660.



Source: *World Inequality Database, available at https://wid.world/country/italy/ (accessed 16 March 2021).*

The data presented above plainly show how developed Countries are facing an inequality and distributive issue. However, a difficult task is trying to find a correlation between this inequality problem and the rising market concentration. Establishing such a correlation will be the topic of the following paragraph.

2. The relationship between inequality and market concentration

The starting point in trying to establish a connection between inequality and market power is an in-depth analysis of market concentration and market power levels in both the U.S. and the EU context. After having established that market power rates play a significant role in our economy, as inequality does in our society, we can try to connect these factors and draw conclusions from such an analysis.[116]

[116] An exhaustive overview on the debate about market concentration and inequality is provided by A. Schechter, *Is There a Connection Between Market Concentration and the Rise in Inequality?*,

According to Joseph Stiglitz – referring to the U.S. economy – *today we are living in an economy where a few firms can rake in massive amounts of profits for themselves and persist unchecked in their dominant position for years and years*.[117] This description is corroborated by findings of a recent and accurate OECD Report about industry concentration in Europe and North America.[118] The Report found *a noticeable increase in concentration for both Europe and North America*.[119] The analysis covers the 2000-2014 time frame and it first found that among 2-digit industries, the 77 percent in Europe and the 74 percent in North America registered an increase in their concentration.[120] In the analysed period, concentration levels increased respectively by 4 and 8 percent in the European and North American average industry.[121] Furthermore, such a trend has been observed in both manufacturing and services industry, either in Europe and in North America.[122] Finally, the increase has been registered in digital-driven sectors and more traditional ones, as well.[123] Anyhow, although a more interventionist approach by competition law seems to be needed in the whole industry, the digital sector – although it could seem otherwise – holds some features which are likely to render dominance and concentration more stable and durable. At this purpose, a recently issued OECD Report notes that *technology may helping larger firms achieve higher level of mark-ups and market power, thereby altering the balance of competition relative to smaller firms*.[124] Indeed, this Report, which confirms an overall trend towards greater industry concentration, points out how larger firms are in a better position in order to hold greater amounts of data needed to develop complex and

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Promarket, 5 May 2017, available at https://promarket.org/2017/05/05/connection-market-concentration-rise-inequality/ (accessed 17 March 2021).

[117] J.E. Stiglitz, *People, Power and Profits. Progressive Capitalism for an Age of Discontent*, Allen Lane, 2019, 47.

[118] M. Bajgar, G. Berlingieri, S. Calligaris, C. Criscuolo, J. Timmis, *Industry Concentration in Europe and North America*, OECD Productivity Working Papers no. 18, OECD Publishing, January 2019. See also M. Jarsulic, *Antitrust Enforcement for the 21st Century*, The Antitrust Bulletin, 2019, 64(4), 517.

[119] *Ibidem*, 26.

[120] *Ibidem*.

[121] *Ibidem*, 27.

[122] *Ibidem*, 28-29.

[123] *Ibidem*, 29-30.

[124] M. McMahon, S. Calligaris, E. Doyle, S. Kinsella, *Scale, market power and competition in a digital world: Is bigger better?*, OECD Science, Technology and Industry Working Papers 2021/01, OECD, 2021, 44.

advanced technologies.[125] The same Report, in line with our thesis, suggests adopting *appropriate responses* in order to prevent harm to competition and consumer welfare.[126]

Once showed the increasing trend in industry concentration and market power, a further step is needed, *i.e.* linking such a trend to inequality and distributional concerns. This issue is brilliantly summarised by the title of a 2017 OECD Report, *Inequality: A hidden cost of market power*.[127] However, except for the contribution by Comanor and Smiley in 1975,[128] such a connection has not been object of intense research efforts,[129] although it has now gained pace.

It is worth starting this analysis by reminding that Comanor and Smiley in 1975 affirmed that *past and current monopoly has had a major impact on the current degree of inequality*.[130] More recently, a joint Report by the World Bank and the OECD affirmed that market power has a dual effect: It both grants supra competitive profits for powerful companies and charges higher prices to consumers. Consequently, according to the Report, the negative effects are charged on poor people, who pay higher prices for consumption goods without receiving a share of the increased profits mentioned above.[131] The same research also found that – across the surveyed Countries – 1/10 to 1/4 of the richest 10%'s share of wealth comes from market power.[132] Moreover, the Authors of such research, after having found that a range between 10% and 24% of the most affluent classes' wealth stems from market power, affirmed quite clearly that *market power may account for a substantial amount of wealth inequality*.[133] In their conclusion, they also suggest

[125] *Ibidem*, 44-45.
[126] *Ibidem*, 45.
[127] S. Ennis *et al.*, *Inequality: A hidden cost of market power*, OECD, 2017, 7-8, available at https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf (accessed 17 March 2021).
[128] W.S. Comanor and R.H. Smiley, *Monopoly and the Distribution of Wealth*, The Quarterly Journal of Economics, 1975, 89, 2, 177.
[129] S. Ennis *et al.*, *Inequality: A hidden cost of market power*, cit., 7-8; S. Ennis and Y. Kim, *Market Power and Wealth Distribution*, in World Bank and OECD, *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*, World Bank, 2017, 134.
[130] W.S. Comanor and R.H. Smiley, *Monopoly and the Distribution of Wealth*, cit., 194.
[131] S. Ennis and Y. Kim, *Market Power and Wealth Distribution*, cit., 134. See also L. Khan and S. Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontent*, cit., 235-236, 238-239.
[132] *Ibidem*, 134-135.
[133] *Ibidem*, 151.

the necessity for a stronger competition enforcement in order to tackle market power and the inequalities it implies.[134]

The existing link between inequality and market power has been confirmed and brilliantly summarised also by the leading economist Joseph Stiglitz, who argued that *market power has, of course, distributive effects as well. The monopolist's rents come at the expense of consumers: As monopolies raise their prices, their profits increase, while the well-being of consumers and workers decreases. An increase in market power is associated with an increase in inequality*.[135]

Additionally, a recent research paper issued by the University of Oxford accurately tries to add further evidence on the correlation between market power and inequality.[136] This paper, in particular, aims at strengthening the correlation between the role of competition law and the rising inequalities.[137] In particular, by associating, *inter alia*, the Gini coefficient and indexes which 'measures' competition rules, the study found that more comprehensive competition laws could be associated with reductions in the level of income inequality.[138] Such a research is particularly important, because it confirms – relying on data – that competition law shall play a role in reducing income inequality in our societies. Moreover, it responds to the argument that reducing inequality is not a task for competition law, but for other policies, such as taxation.[139] First of all, such a trade-off is inherently excluded by the proven correlation between stronger competition law and decreasing income inequality levels. Furthermore, the analysed Oxford study

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[134] *Ibidem*. See also S. Ennis *et al.*, *Inequality: A hidden cost of market power*, cit., 8 and 24. See also J.E. Stiglitz, *Towards a Broader View of Competition Policy*, in T. Bonakele, E. Fox and L. Mncube (Eds.), *Competition Policy for the New Era: Insights from the BRICS Countries*, Oxford University Press, 2017, 18-20; F. Ilzkovitz and A. Dierx, *Competition policy and inclusive growth*, VoxEU, 19 June 2016, available at https://voxeu.org/article/competition-policy-and-inclusive-growth (accessed 17 March 2021).

[135] J.E. Stiglitz, *Towards a Broader View of Competition Policy*, cit., 4.

[136] A. Zac, C. Casti, C. Decker, A. Ezrachi, *Competition Law and Income Inequality: A panel data econometric approach*, University of Oxford, Centre for Competition Law and Policy Working paper CCLP(L)52, 22 September 2020, available at https://www.law.ox.ac.uk/sites/files/oxlaw/working_paper_-_competition_law_and_income_inequality.pdf (accessed 17 March 2021).

[137] *Ibidem*, 6 and 37.

[138] *Ibidem*, 22 and 26.

[139] In favour of different means than competition law, such as taxation, see, *inter alia*, R.D. Blair and D.D. Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, Fordham Law Review, 2013, 81, 2505.

explicitly distinguishes the role that both competition law and taxation shall play in reducing inequalities. The first is seen as a *pre-distribution* tool, while the latter is described as a *redistribution* mean.[140] The difference is clear and straightforward and it is due by the fact that, according to the study, competition law impacts pre-tax incomes rather than post-tax ones.[141] Such a distinction is evident, because tax law can intervene only *downstream* in the distribution process, whilst competition law, which is more linked to the structure of the whole productive process, can have an *upstream* impact on how income can be distributed among all market participants and citizens. However, this upstream and structural result on distributional dynamics can be reached only by means of a more structuralist approach to the competitive process, which takes into account the degree of concentration in the relevant market, the (effective) opportunities to enter such a market and the effective functioning of competition in it. Such an approach seems consistent with the 'effective competition standard' suggested by Stucke and Steinbaum[142] or the 'protection of competition test' advanced by Wu.[143] This change of perspective appears particularly needed in digital markets, where the so-called 'superstar companies' are constantly increasing their power,[144] as we will see in chapter 5 of the present work. Anyhow, and by now, once established the link between inequality and weak competition, we can affirm that, as a reaction and proper solution to inequalities a stronger enforcement of competition law is needed. This target, which is also a sort of 'cure', can take different shapes and it can be

[140] A. Zac, C. Casti, C. Decker, A. Ezrachi, *Competition Law and Income Inequality: A panel data econometric approach*, cit., 39.
[141] *Ibidem*.
[142] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, The University of Chicago Law Review, 2019, 86, 595, available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6188&context=uclrev (accessed 17 March 2021); M.E. Stucke, *Invited Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law*, 13 March 2020, available at https://judiciary.house.gov/uploadedfiles/submission_from_maurice_stucke.pdf (accessed 17 March 2021). See also M.E. Stucke and A. Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, Harvard Business Review, 15 December 2017, available at https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement (accessed 17 March 2021).
[143] T. Wu, *The Curse of Bigness*, cit., 160.
[144] R. Shivakumar, *The market power of 'superstar' companies is growing*, Chicago Booth Review, 26 October 2017, available at https://review.chicagobooth.edu/economics/2017/article/market-power-superstar-companies-growing (accessed 17 March 2021), referring to the original contribution by S. Rosen, *The Economics of Superstars*, The American Economic Review, 1981, 71, 5, 845.

reached through the introduction of various tools, such as legislative reforms, different judicial interpretations, and improved enforcement practices. However, in such a challenge, academia has a prominent role to play, by trying to embrace innovative solutions, rather than relying on past – although well-established – ones.

A good suggestion on the role that academia should play is represented, for instance, by the 'recipe' advanced by Professor Lianos. According to this Author *the current state of competition law […] should surely attempt to oblige the democratic quest for a more active competition enforcement role in tackling economic equality and poverty*.[145] Additionally, and in line with Professor Gal's theory, such an approach to competition law is justified by the fact that this subject shall be considered as part of the social contract lying behind our societies.[146] Also Atkinson claimed for an explicit inclusion of distributional concerns into competition law's objectives.[147]

However, given that competition law is not the cure for every disease, when it cannot perform this task by itself, it can act as a complement to other policy options, such as taxation.[148] In doing this we have to bear in mind the above explained different role played by pre-distributive and redistributive tools. In this sense, understanding the *multi-value* soul of competition law and, in particular, its original structuralist aim, appears fundamental.

[145] I. Lianos, *Competition Law as a Form of Social Regulation*, cit., 11.
[146] M.S. Gal, *The Social Contract at the Basis of Competition Law. Should We Recalibrate Competition Law to Limit Inequality?*, in D. Gerard and I. Lianos (Eds.), *Reconciling Efficiency and Equity*, cit., 88
[147] A.B. Atkinson, *Inequality. What Can Be Done?*, Harvard University Press, 2015, 126-127, 237.
[148] J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, cit., 27. Also M.S. Gal, *The Social Contract at the Basis of Competition Law*, cit., 89, suggests that competition law *is part of a broader set of governmental instruments designed – at least in theory – to collectively meet the goals of the social contract*. However, the issues raised by taxation are explained at footnote no. 115 above.

3

The goals of U.S. antitrust law: An evolutionary perspective

We are in a position, after the experience of the last twenty years, to state two things: In the first place, that a corporation may well be too large to be the most efficient instrument of production and distribution, and, in the second place, whether it has exceeded the point of greatest economic efficiency or not, it may be too large to be tolerated among the people who desire to be free.[149]

This chapter is directed at deepening our knowledge of the goals that guided the creation and the subsequent development of U.S. antitrust law. In particular, in order to understand the evolution of U.S. Antitrust law through the Nation's history, we will analyse the legislative intent of the Congress which passed the Sherman Act and we will focus on the relevant interpretations given to this statute by the American judiciary. We will notice how the structural approach that animated the

[149] Justice Louis D. Brandeis, *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings Pursuant to S. Res. 98*, Before the Committee on Interstate Commerce, 62d Cong. 1174 (1912), cited by T. Wu, *The Curse of Bigness*, cit., 63-64.

first years of the U.S. regime and the post-war period has left the place to an interpretation guided by economic goals centred on efficiency. Our analysis will then focus on the recent proposals directed at 'revitalising' US antitrust law, especially with regard to the new 'bigness' threat represented by tech giants. However, in order to return to a more effective antitrust enforcement, these proposals deem necessary reverting to the very origins of antitrust. Therefore, an evolutionary perspective over US antitrust law appears necessary to understand what its future evolutions will be.

1. The US context

The United States represent the most traditional model of antitrust legislation. Indeed, the naissance of antitrust law as we commonly refer to can be set in 1890, when the Sherman Act was enacted.[150] Consequently, an analysis of the goals that have characterised the evolution of U.S. competition law is essential at our ends. In fact, the current debate on how to reform competition law in order to render it fit for the challenges of the new century, especially digitisation, always begin from the same question, that is *what are the goals of antitrust law?* We could start by arguing that there is not a standard and unambiguous answer to this question. The reason can be found in the various conceptions of antitrust law that have characterised its history in the U.S. legal and economic environment. According to some authors, indeed, the history of U.S. antitrust law can be seen as a pendulum swinging from stronger enforcement and structuralist approaches at certain times to a more efficiency-driven and low-enforcement touch in others.[151] However, the question about the goals of competition law remains at stake, with an additional query: Is

[150] We make reference to the Sherman Act as the first *modern* antitrust statute, although provisions aimed at regulating competition were present even in the Roman Empire, with the *Lex Iulia de Annona*, dated around 18 b.C.. Recently, also the EU Commission's Executive Vice-President M. Vestager made reference to this Roman law in the speech *A New Era of Cartel Enforcement*, delivered at the Italian Antitrust Association Annual Conference, 22 October 2021, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en (accessed 11 February 2022).

[151] D.F. Broder, *U.S. Antitrust Law and Enforcement*, Oxford University Press, 2016, 5; E.M. Fox, *The Efficiency Paradox*, in R. Pitofsky (Ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, 2008, 77.

there a hard core of antitrust law's goals or this subject is left to the influence of the main political or economic conceptions of each era? In order to answer these questions, it is essential to retrace the main phases that characterised the U.S. antitrust law's pendulum, starting from its very beginning before reaching the current debate, which, not causally, makes great reference to the initial ideals enshrined in the Sherman Act.

It is worth taking as a starting point the statement by business historian Richard John, according to whom antimonopoly is older than the republic itself.[152] Indeed, as a telling example, two 'founders' of the United States like Thomas Jefferson and James Madison discussed about a possible ban on monopolies in the Constitution proposal. In particular, on 20 December 1787 Jefferson wrote to Madison that he did not like the omission of a restriction against monopolies from the Bill of Rights.[153] Later in 1788 Madison told Jefferson that monopolies *are justly classed among the greatest nuisances on Government* and that they represent *sacrifices of the many to the few*.[154]

However, the hostility towards monopolies was first seen as a rejection of public monopolies, in line with the Statute of Monopolies enacted in 1624 in England.[155] Anyhow, the growing industrialisation saw the emergence of even bigger companies. Indeed, after a first phase of the American history when a multitude of companies competed fiercely among them, afterwards the winners of such

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[152] A. Schechter, *When Did American Stop Being Antimonopoly? Q&A with Richard R. John*, Promarket, 21 November 2016, available at https://promarket.org/2016/11/21/americans-stop-antimonopoly-q-richard-r-john/ (accessed 8 April 2021). See also R.R. John, *Robber Barons Redux: Antimonopoly Reconsidered*, Enterprise & Society, 2012, 13, 1, 5.

[153] Letter from Thomas Jefferson to James Madison, 20 December 1787, reported by P. Raj, *Antimonopoly Is as Old as the Republic*, Promarket, 22 May 2017, available at https://promarket.org/2017/05/22/antimonopoly-old-republic/#:~:text=Antitrust%20and%20the%201890%20Sherman%20Act&text=Business%20historian%20Richard%20John%20of,as%20old%20as%20the%20republic.%E2%80%9D (accessed 8 April 2021). See also S.G. Calabresi and L. Price, *Monopolies and the Constitution: A History of Crony Capitalism*, Northwestern University School of Law Scholarly Commons, Faculty Working Papers no. 214, 2012, 30-31, available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1213&context=facultyworkingpapers (accessed 10 April 2021).

[154] Letter from James Madison to Thomas Jefferson, 17 October 1788, reported by P. Raj, *Antimonopoly is as Old as the Republic*, cit. See also S.G. Calabresi and L. Price, *Monopolies and the Constitution: A History of Crony Capitalism*, cit., 31.

[155] T. Wu, *The Curse of Bigness*, cit., 54; I. Lianos, V. Korah, P. Siciliani, *Competition Law*, Oxford University Press, 2019, 52.

competition tried to figure out schemes to stabilise their prominent role in the market.[156] A first scheme adopted by entrepreneurs consisted in the so-called pooling, but it was denied in the railway industry by the 1887 Interstate Commerce Act and – given the lack of internal enforcement measures – it was exposed to the free rider problem.[157] As a consequence, new schemes were elaborated and among them a major role was covered by the trust, promoted by J. Rockefeller. In particular, by using the traditional common law trust institute, by means of exchanging voting proxies, directors of different and competing companies could coordinate the pricing policies of their companies.[158] It is evident that the opposition to this practice gave the name to the body of legislation called antitrust law.

From the ideological standpoint, Hans B. Thorelli underlines that during the decades preceding the Sherman Act's enactment, two ideologies were contributing to the debate around monopolies. For the sake of simplifying, one side was represented by the doctrines of individualism, linked to the theory of evolutionism, which was in favour of *laissez-faire* and justified advantages or inequalities, because they were derived by a superior acumen.[159] The other side was represented by the so-called *social gospellers* and the *New School of Economics*, which called for an approach more attentive to social issues and the human aspects of individuals.[160] Other authors were not affiliated to any of those schools, but participated in the debate concerning monopolies.[161] One of them was William W. Cook, according to whom monopolies represent *a product of the highest order of business talent and executive ability. It is at once a monument to American genius and a symbol of American rapacity*.[162] In his opinion, an anti-combination policy was essential in order to keep the market competitive.[163] Moreover, and in

[156] G. Amato, *Il potere e l'antitrust: il dilemma della democrazia liberale nella storia del mercato*, Il Mulino, 1998, 13. The English edition of the book is titled *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, published by Hart Publishing, 1997.
[157] *Ibidem*.
[158] *Ibidem*, 13-14.
[159] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, Allen & Unwin, 1954, 113-114.
[160] *Ibidem*, 117-127.
[161] *Ibidem*, 127.
[162] W.W. Cook, *Trusts: The recent combinations in trade, their character, legality and mode of organization, and the rights, duties and liabilities of their managers and certificate holders*, 4.
[163] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit., 129-131.

accordance with our observation above about the common law origin of the monopoly debate, he referred to the famous *Case of Monopolies* decided by the English Queen's Bench in 1602.[164] In this case, the Court indeed stated that monopolies lead to an increase in price, that the commodity is *not so good and merchantable as it was before* and that, consequently, it impoverishes the people who created such a commodity with their manual work.[165]

However, given a scenario where *the agricultural frontier was disappearing* and the American economy was facing a transformation towards mass production, thus leading to the consequence that newcomers, due to high fix costs, were less likely to enter, the opposition to the growing trusts, like *Standard Oil*, was growing.[166] Historian Richard Hofstadter described this transformation by stating that *bigness had come with such a rush that its momentum seemed irresistible. No one knew when or how it could be stopped*.[167]

The natural consequence of the described hostility against monopolies was the enactment of the Sherman Act in 1890.[168] This bill – if we want to establish a link in our exposition, in a sort of imaginary line with the 1787 reported letter from Thomas Jefferson to James Madison – has been defined by the Supreme Court as *the Magna Carta of free enterprise*, which is *as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms*.[169] Consequently, it is now worth analysing the primary aims laying behind the enactment of the Sherman Act.

[164] Queen's Bench, 1602, *Darcy v. Allen (The Case of Monopolies)*, (1602) 77 E.R. 1260.
[165] *Ibidem*, 1263. See also I. Lianos, V. Korah, P. Siciliani, *Competition Law*, cit., 52.
[166] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit. 161-163.
[167] R. Hofstadter, *What Happened to the Antitrust Movement?*, in R. Hofstadter (Ed.), *The Paranoid Style in American Politics and Other Essays*, Vintage Books, 2008, 196 (original publication by A.A. Knopf in 1965).
[168] It is worth reminding that several States had adopted antitrust rules before the Sherman Act's enactment. However, an antitrust statute at the federal level was particularly needed in order to regulate interstate commerce. See E. Combe, *Économie et politique de la concurrence*, Dalloz, 2020, 60.
[169] U.S. Supreme Court, decision 29 March 1972, *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), at 610.

2. Fighting market concentration: The enactment of the Sherman Act

The Sherman Act was enacted on 2 July 1890 and its main provisions – Section 1 about cartels and Section 2 on monopolisation – have been drafted in a broad and indefinite manner, thus rendering the correct interpretation of the relevant legislative intent even more essential. Of course, this style has its merits and weaknesses. An open definition of the forbidden abuses can render a legislative instrument more adequate to regulate the relevant matter form almost all the coming years, especially in an economic context which is under continuous evolution, like the actual one and when the Sherman Act was passed.[170] Obviously, net of the positive aspect just described, such an open legislative drafting style has the drawback of not properly defining each wrongful conduct. A complete list of anticompetitive behaviours would not have been the right solution, because once established the characteristics of the various infringements, corporations would have adopted more sophisticated behaviours to escape their liability. Anyhow, the chosen style empowers the Courts with the great responsibility of fulfilling the Act's open provisions with content. This task has also been confirmed by the same U.S. Supreme Court, stating that *the prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity, and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and, in the performance of that function, it is appropriate that courts should interpret its words in the light of the legislative history and of the particular evils at which the legislation was aimed.*[171]

Moreover, such a content shall also be adapted by means of judicial decisions to the evolving times and economic cycles. This 'adaptation' process stands at the basis of the 'pendulum' metaphor mentioned above and it has characterised nearly all the course of American antitrust history. During this evolutionary process, Courts have debated over the legislative aim of the Sherman Act's proponents and the function

[170] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit., 229.
[171] U.S. Supreme Court, decision 27 May 1940, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), at 489.

of such legislation, by reaching different outcomes. Therefore, if we want to recalibrate antitrust provisions in order to restore a competitive and inclusive economy, we need to start our analysis at the moment when the Sherman Act bill was proposed and discussed.[172]

First of all, and in accordance with the mentioned statement by the Supreme Court in the *Trans-Missouri* case, it is worth starting with the content of the Sherman Act. In a nutshell, Section 1 prohibits *every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,* whilst Section 2 condemns *every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations*. In the words of Senator Sherman, these provisions were necessary *to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition*.[173] If we link the provisions of the Sherman Act and the primary intent expressed by Senator Sherman, it seems easy to infer that the Act was seen as an instrument to protect the structure of competitive markets, by impeding restraints of trade by means of trusts or other forms of combination or monopolisation.[174] In other words, competition was seen as rivalry granted by the absence of excessively powerful economic players.[175] The other benefits, like increased efficiency or production

[172] According to the U.S. Supreme Court, in decision 22 March 1897, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), at 318-319, *debates in Congress are not the appropriate sources of information from which to discover the meaning of the language of a statute*, because *it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body by resorting to the speeches of individual members thereof*. As a consequence, according to the Supreme Court, *the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed*. The same considerations have been expressed by the same U.S. Supreme Court in decision 15 May 1911, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), at 50. In order to complain with the Supreme Court's *dicta*, we have already analysed the history which preceded the enactment of the Sherman Act and we will rely on the declarations made by Senator Sherman in the legislative debate only in order to extrapolate the aims that moved the bill's proponent in light of *the history of the times when it was passed*. Moreover, we will link Senator Sherman's statements with the language of the act, in order to find a common sense among all these sources that will be particularly helpful in finding the Act's original purpose.
[173] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit., 168-169.
[174] B. Orbach, *How Antitrust Lost its Goal*, Fordham Law Review, 2013, 81, 2262; S. Vaheesan, *The Profund Nonsense of Consumer Welfare Antitrust*, The Antitrust Bulletin, 2019, 64, 4, 480-481.
[175] C. Osti, *Antitrust: a Heimlich manoeuvre*, European Competition Journal, 2015, 11, 1, 228.

levels for companies and lower prices for consumers, were intended not like a primary concern of competition law, but as a result of the market's competitive structure, a positive by-product of intense competition.[176]

From this attention on the maintenance of a competitive process, it is also possible to infer that other possible and likely by-products of competition can stem from such a dynamic business environment. We are referring here to social issues, in light of the debate addressing whether antitrust law shall address social concerns or not. Maybe not directly, but of course indirectly, as a consequence of keeping markets open. The impacts of competition on social concerns have been directly addressed also by Senator Sherman during the discussions of his bill. In particular, he pointed out that *the popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. […] Congress alone can deal with them [the trusts], and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life*.[177] Sherman then continued by calling the increasing 'trustification' of the economy the *law of selfishness*[178] and by stating that *if we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity*.[179] We reported these passages from the debate about the Sherman Act because, also if they could not be properly used in order to find the real legislative intent behind the bill, they are a cross-section of the debate around monopolies and the dangers that they could cause to society. Critics of this 'all-embracing' approach to competition law may call that monopolies can also lead to some efficiency and that a structuralist interpretation could stifle such a positive consequence of combination. However, Senator Sherman and the other drafters of

[176] E.M Fox, *The Efficiency Paradox*, cit., 88.
[177] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit., 180.
[178] *Ibidem*.
[179] *Ibidem*.

the Act[180] were well aware of the efficiency issue and they intended the act only for combinations that were detrimental to free competition in the market.[181] At this purpose, Thorelli adopts the telling metaphor of the police patrol, which control the *highways of commerce […] to keep the road open for all and everyone*.[182] In conclusion, as this Author pointed out in his outstanding historical analysis about the Sherman Act, the immediate beneficiary of this legislation was the small business proprietor, which, thanks to the Act, would have her/his opportunities on the market safeguarded from anticompetitive behaviours, because those opportunities are an inherent feature of a competitive system. Then – and this will be helpful while discussing the meaning of the expression 'consumer welfare' below – an ultimate beneficiary of the Sherman act could be the consumer, which could take advantage of higher quality products and lower prices due to the regime of competition which proves beneficial for the entire production chain.[183] However, as Thorelli concludes, it is worth bearing in mind that the Act was not only intended as a piece of economic legislation, but *in safeguarding rights of the 'common man' in business 'equal' to those of the evolving more 'ruthless' and impersonal forms of enterprise the Sherman Act embodies what is to be characterized as an eminently 'social purpose'*.[184]

Given the analysis of the debate around the Sherman Act, it is now worth analysing the content that the Supreme Court gave to the broad and indefinite provisions just enacted. We split our analysis into two main frames, which corresponds to different conceptions given to competition law. It is also worth recognising how these conceptions of antitrust were linked to a sort of political influence, caused by the economics ideals of each period and by the consequential appointments made by the various Administrations.[185] For the sake of simplifying, we could refer to a

[180] Of course, we would like to clarify that the final Sherman Act that was passed was not a creation of Senator Sherman alone. Instead, it was the outcome of an intense parliamentary debate, which produced lots of amendments to the bill. See B. Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, Antitrust Law Journal, 2014, 79, 3, 892.
[181] H.B. Thorelli, *The federal antitrust policy: Origination of an American Tradition*, cit., 184-185.
[182] *Ibidem*, 226.
[183] *Ibidem*, 227.
[184] *Ibidem*.
[185] D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 9-10; F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, in R. Pitofsky (Ed.), *How the Chicago School Overshot the Mark*, cit., 36-37; T.E. Kauper, *Influence of Conservative Economic Analysis of the*

before Chicago School moment and a post Chicago School scenario. In the first one – if we make an exception for the Great Depression and the consequent New Deal period – antitrust law was enforced fiercely in the U.S., coherently with the structuralist approach outlined while describing the Sherman Act legislative path. In the second moment we will refer to, competition rules were devoted at promoting efficiency, in a fashion that reached the consequence of denying the Sherman Act's social purpose highlighted above.

3. U.S. Antitrust in the first half of the XX Century

Among the initial significative antitrust cases decided by the U.S. Supreme Court after the Sherman Act's entry into force, we could first refer to the abovementioned 1897 *Trans-Missouri* case. The controversy involved a price-fixing cartel among several railway carriers. The cartel, at a certain extent, was in favour of the consumers, because it set a 'reasonable' price after years of fierce competition and the consequent tariffs' fluctuations.[186] In this case, the Supreme Court adopted a rigid structuralist approach, by strictly interpreting the law, according to which *every* contract which restrict competition shall be deemed in contrast with antitrust law, independently of the reasonableness of the result it is proposed to reach.[187] Indeed, the Court argued that the possible reasonable effects brought by the combination are not a just cause in order to distort competition, because *competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom.*[188] However, the dissenting opinion of Justice White[189] opposed that such an interpretation would run against the traditional common law rule of reason in contractual relationships, which is seen as essential for the freedom of contract principle.[190] This dissent, arguing for a different treatment of reasonable and

Development of the Law of Antitrust, in R. Pitofsky (Ed.), *How the Chicago School Overshot the Mark*, cit., 44.
[186] G. Amato, *Il potere e l'antitrust*, cit., 15-16.
[187] *Ibidem*, 16. See 166 U.S. 290 (1897), at 328.
[188] 166 U.S. 290 (1897), at 337.
[189] *Ibidem*, starting from 343.
[190] G. Amato, *Il potere e l'antitrust*, cit., 16-17.

unreasonable restrictions, will be recalled later in 1911, when the Supreme Court ruled for the Standard Oil monopoly's breakup.[191] At this purpose it is worth recalling that Standard Oil controlled more of 90% of U.S. refining capacity.[192] During the years, the company increased its bargaining power towards railroad carriers, thus using this power to prevent the entry of new refineries in the market.[193] In this case the Supreme Court condemned Standard Oil's behaviour, but established the rule of reason, by declaring that the Sherman Act prohibited *unreasonable* and *undue* restraints of trade, like the one carried on by Standard Oil.[194] The rule of reason framework established in this case is still used today, although on a different shape. Indeed, if the Chicago School characterised the rule of reason with economic efficiency, previous decisions, like the 1918 *Chicago Board of Trade*[195] one, in which the opinion of the Court was delivered by Justice Brandeis, parametrised such a rule on structural basis. In this decision the Supreme Court deemed reasonable that the Board of Trade could block on the last morning price of wheat acquired remotely in the afternoon and shipped to Chicago. This mechanism would indeed have helped small producers against the great market power held by big acquiring companies.[196]

From a legislative standpoint, in 1914 were passed both the *Federal Trade Commission Act* and the *Clayton Act*, which was directed at preventing unfair competition.[197]

After the 1929 crisis and in the New Deal context the need to boost the American industry's recovery resulted in a sort of *stand-still* of antitrust rules.[198] The National

[191] 221 U.S. 1 (1911).
[192] J.B. Baker, *The Antitrust Paradigm. Restoring a Competitive Economy*, Harvard University Press, 2019, 36.
[193] *Ibidem*, 36-37.
[194] 221 U.S. 1 (1911), at 1. See also H.L. Wilgus, *The Standard Oil Decision: The Rule of Reason*, Michigan Law Review, 1911, 9, 645 and J.B. Baker, *The Antitrust Paradigm*, cit., 37.
[195] U.S. Supreme Court, decision 4 March 1918, *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).
[196] G. Amato, *Il potere e l'antitrust*, cit., 17.
[197] According to Combe, the Clayton Act can be seen as a reaction to financial scandals and the rising concentration of large firms through mergers and acquisitions, which fell outside the scope of the previously enacted Sherman Act. See E. Combe, *Économie et politique de la concurrence*, cit., 62.
[198] The only exception is represented by the enactment of the Robinson-Patman Act in 1936. This statute was aimed at protecting small businesses from price discrimination and predatory pricing strategies. See D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 6-7.

Industrial Recovery Act (NIRA) was indeed passed in 1933 and it was aimed at sustaining prices and salaries also by means of a limited level of competition among firms.[199] Furthermore, under the supervision of the National Recovery Administration, companies in certain industries were allowed to cartelise,[200] in order to reach the economies of scale and size needed to drive the United States out of the financial downturn. It is however noteworthy to consider that, according to recent studies reported by Combe, the NIRA and this pause in the application of antitrust rules – if compared to a competitive system – did not reach the target of sustaining the American economy, thus prolonging the economic crisis.[201] This observation is of particular significance when State planning or deeper regulation is suggested as a cure to resolve the problems created by a competitive environment. As we will see below in this chapter, we believe that the solution to these problems shall not be found outside the realm of competition law, but within it.

Subsequently, from the 1940s and the 1970s competition law entered the so-called 'structural era', when, as well described by Baker, competition was seen as the fair point of encounter between producers and consumers (including small entrepreneurs), under what can be called a 'political bargain'.[202] This bargain saw antitrust law as the chosen model for regulating the economy, instead of a pure *laissez-faire* approach or a regulatory one.[203] In fact, the categories involved found that regulation of market through competition could allow a fair distribution of efficiency gains arising out from competition.[204] This compromise was sustained in particular by Thurman Arnold, who led the Department of Justice's Antitrust Division from 1938 to 1943.[205] Apart from antitrust law, an important part in this bargain was played by a sort of social safety net, constituted by social assurances intended to remedy to the eventual failures caused by the competitive process.[206]

[199] E. Combe, *Économie et politique de la concurrence*, cit., 68.
[200] J.B. Baker, *The Antitrust Paradigm*, cit., 38.
[201] E. Combe, *Économie et politique de la concurrence*, cit., 68.
[202] J.B. Baker, *The Antitrust Paradigm*, cit., 39-41.
[203] *Ibidem*, 38-39.
[204] *Ibidem*, 41.
[205] *Ibidem*, 39.
[206] *Ibidem*, 41.

During this 'structural' period, Courts issued some judgements which strengthened the original and 'social' view of competition policy's objectives described above. A strong theoretical basis to this era's approach, marked by Chief Justice Earl Warren's presidency of the Supreme Court (from 1953 to 1969), was provided by the so-called Harvard School. In particular, competition enforcement was guided by the assumption that markets were to be protected and this interventionist approach was sustained by the Harvardian S-C-P (structure-conduct-performance) paradigm.[207] According to this theory, the structure of a market determines the firms' conduct and consequently the market's performance. As pointed out in Jones and Sufrin's manual, it was believed that high market concentration led to conducts which generated poor economic performance and monopoly prices.[208]

In 1945, in the well-known *Alcoa* decision,[209] the Court of Appeals for the Second Circuit disposed the breakup of the main American aluminium monopolist. Judge Learned Hand, in his opinion, affirmed that the Congress, while enacting the Sherman Act, was pursuing the purpose of *put an end to great aggregations of capital because of the helplessness of the individual before them*.[210] In addition, he stressed that *it is possible, because of its indirect social or moral effect, to prefer a system of small producers, each independent for his success upon his own skill and character to one in which the great mass of those engaged must accept the direction of a few*.[211]

In a similar shape, the 1962 *Brown Shoe* judgement,[212] the Supreme Court stressed the importance of maintaining a proper competitive process and favouring decentralisation of market power, by stating that *it is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the*

[207] A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, Oxford University Press, 2019, 36.
[208] *Ibidem*, 14-15.
[209] U.S. Court of Appeals for the Second Circuit, decision 12 March 1945, *United States v. Aluminium Co. of America et al.*, 148 F.2d 416 (2d Cir. 1945).
[210] 148 F.2d 416 (2d Cir. 1945), at 428.
[211] 148 F.2d 416 (2d Cir. 1945), at 427.
[212] U.S. Supreme Court, decision 25 June 1962, *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[213] The Court stressed also the *desirability of retaining 'local control' over industry and the protection of small businesses*.[214]

At this point of our path across the history of American antitrust statutes' interpretation, we would like to stress that, with some exceptions, U.S. antitrust law was first interpreted according to the view of protecting the competitive process, which consequently would spread its benefit especially to small businesses and consumers. We can also notice a sort of rejection for market concentration. However, after this 'structural' period, a new thinking, based on neoclassical economics, has taken over. For the sake of simplifying – although the history is a little more complex[215] – this new reasoning in antitrust has been identified with the so-called Chicago School, whose central figures were Aaron Director and Robert Bork. In particular, the *Chicago revolution* in antitrust law shifted the focus from the fear for concentration and the interest of small economic actors, to the so-called consumer welfare, intended by the Chicagoans as economic efficiency.[216]

4. The cult of efficiency and the advent of Chicago School: U.S. antitrust law until present days

The new approach to antitrust suggested by the Chicago school has been named a 'revolution' because it changed dramatically the way in which antitrust statutes have been interpreted since their enactment. As we have previously anticipated, the main exponent of this school was Aaron Director's disciple Robert Bork, author of *The Antitrust Paradox*.[217] This figure is quite controversial, both in the antitrust environment and also in the general context. For instance, after being appointed by President Reagan as Judge in the Court of Appeals for the District of Columbia in

[213] 370 U.S. 294 (1962), at 344.
[214] *Ibidem*, at 315.
[215] This point has been interestingly raised by W.E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, The University of Chicago Law Review, 2020, 87, 2, 459, who recognizes also the important contribution brought to the evolution of antitrust law by the so-called Harvard School, represented by figures such as Philip Areeda and Donald Turner.
[216] E.M. Fox, *The Efficiency Paradox*, cit., 77; A.B. Atkinson, *Inequality*, cit., 126.
[217] R. Bork, *The Antitrust Paradox*, Free Press, 1978.

1982, five years after he was nominated by the same President Reagan for substituting Justice Lewis Powell in the Supreme Court, but the Senate rejected the approval due to his excessively conservative views, especially on social ad civil rights issues. However, returning to our path, the paradox found by Bork in the mainstream interpretation of antitrust law when he was writing, was that a 'structuralist' intervention by antitrust enforcers could divert the law's objectives and lead to results out of antitrust law's scope.[218] According to this view, the focus on social issues, firms' size and the protection of small enterprises could lead to the paradox of maintaining inefficient firms in the market, whilst competition aims at keeping only the most efficient ones. In particular, a pervasive antitrust intervention could have the side effects of chilling efficiencies[219] and the cost of false positives could be economically much higher than the cost of false negatives. Indeed, according to Chicagoans, whether a burdensome antitrust investigation and lawsuit could prove economically undesirable in case of a false positive, even if some false negatives are present in the market, the latter will automatically self-correct, thus re-establishing a competitive environment.[220] In accordance with this assumption, monopolists are seen as *gentle giants*,[221] which are in constant fear of being dethronized by new competitors. Hence, in a nutshell, the novel interpretation advanced by Bork argued that antitrust should promote efficiency and benefit consumers.[222]

More in detail, with reference to specific conducts, the Chicago School's theorists and Bork argued that mergers shall not be viewed as restraints of competition, but

[218] It is worth mentioning here the observation advanced by B. Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, cit., 896. According to the Author, *the contrasts and contradictions that Bork perceived as the elements of the crisis in antitrust characterize the normal evolution of common law. In such evolution, contrasts and inconsistencies between new and older legal norms may co-exist at any time. […] Antitrust law, which is almost entirely judge-made, inevitably progress inconsistently*.
[219] J.B. Baker, *The Antitrust Paradigm*, cit., 43.
[220] D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 9; M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 598; B. Orbach, *Antitrust Populism*, New York University Journal of Law & Business, 2017, 14, 1, 20. However, according to H. First and S.W. Waller, *Antitrust's Democracy Deficit*, cit., 2571, the focus on avoiding false negatives *systematically undervalues all forms of enforcement and can appear to provide seemingly neutral technocratic justifications for what is merely a normative preference for laissez-faire outcomes*.
[221] Quotation from T. Wu, *The Curse of Bigness*, cit., 117.
[222] D.A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, Antitrust Law Journal, 2014, 79, 3, 847.

as an opportunity for firms to gain the necessary economies of scale to better compete.[223] Likewise, exclusive vertical agreements shall not be deemed anticompetitive, because they are directed at improving distributional efficiencies and prevent free-riding behaviours which could undermine investments in marketing of the relevant products.[224] In line with this view, also predatory pricing or tying were not seen as serious restrictions, but as means to reach an economically efficient outcome. Moreover, if we consider predatory pricing, Chicagoans sustained that selling products at a very low price shall not be deemed rational, because it causes losses which shall then be recovered by means of increasing prices.[225] The same applies to tying, because an entrepreneur cannot extract monopoly profits from both the tying and the tied product.[226]

The common framework that rendered these behaviours economically sound was the presumption that market actors behave rationally. Therefore, in the Chicagoans' view, firms' behaviours shall be evaluated only with the lens of economic efficiency, as rational ones, instead of searching for remote anticompetitive aims.[227] As a result, the economic soundness of firms' behaviour and the mentioned ability of markets to self-correct should limit the stance for antitrust intervention, thus leading to what we can define a sort of residual role for this discipline. In particular, according to the views expressed by Bork in *The Antirust Paradox*, antitrust law should be concerned only by horizontal price-fixing cartel, some big mergers that lead to the creation of monopolies or duopolies and some forms of exclusionary practice.[228]

Moreover, by anchoring their views on economic soundness, the Chicagoans reached the objective of conferring a more predictable and 'stable' suit to antitrust law. In particular, they relied strongly on the so-called price theory, with the consequence of relying primarily on effects to the price structure in order to

[223] J.B. Baker, *The Antitrust Paradigm*, cit., 43.
[224] *Ibidem*.
[225] G. Amato, *Il potere e l'antitrust*, cit., 25-26.
[226] *Ibidem*, 25.
[227] *Ibidem*, 26.
[228] J.B. Baker, *The Antitrust Paradigm*, cit., 43-44; R. Bork, *The Antitrust Paradox*, cit., 47-64.

investigate if an antitrust violation has occurred.[229] It is also worth noting as this formulation was also helped by the administrability concerns raised by the Harvard School, which argued that a plethora of noneconomic goals could render the administrability of antitrust cases practically impossible, thus placing *unacceptable burdens on the courts*.[230] In the view of the Harvard school – subsequently sustained also by the Chicago School – the pursuit of antitrust law's noneconomic goals helped at rendering its interpretation vague, as well as at focusing on conducts that do not carries a significant anticompetitive element, with the consequence of stifling economic efficiency.[231] The school thus viewed competition not as an end in itself anymore, but rather as a means in order to reach efficiency.[232]

The described results retain a particular weigh in today's debate around a 'reform' of competition law because price is seen as a sort of proxy for predictability of outcomes, because it is – of course – an easily measurable item, while others, such as quality, are rather impossible to measure precisely. Anyhow, in markets – like the digital ones – where products do not have a monetary price, quality as well as other features may well become helpful. However, now we have to wonder if price is really such a reliable item that gives antitrust law predictability and economic reliability and if the Chicagoans view is really in line with the original legislative intent while the Sherman Act was enacted. Moreover, in a similar vein, as argued by Osti, also efficiency is a concept difficult to define and even more challenging to measure.[233]

According to Robert Bork, the antitrust statutes were conceived, even in principle, as aimed at promoting economic efficiency and consumer welfare. The problem is that the debate around the true meaning of the expression 'consumer welfare' is very far to be set and a lot of diverging opinions have emerged. For instance, according to Crane, in Bork's view efficiency and consumer welfare are not a

[229] T. Wu, *The Curse of Bigness*, cit., 113-118. In particular, as well summarised by Broder, Chicagoans identified consumer welfare primarily as lower prices. See D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 8-9.
[230] W.E. Kovacic, *The Chicago Obsession*, cit., 474, quoting P.E. Areeda and D.F. Turner, *Antitrust Law: An Analysis if Antitrust Principles and Their Application*, Little, Brown, 1978, 7-33. See also J.B. Baker, *The Antitrust Paradigm*, cit., 46.
[231] W.E. Kovacic, *The Chicago Obsession*, cit., 474.
[232] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 230.
[233] *Ibidem*, cit., 231.

separate concept, but they are two faces of the same medal, they went *hand in hand*.[234] Conversely, other Authors, such as Orbach, have argued that Bork used the edulcorate and attractive expression 'consumer welfare' to hide the real goal of antitrust, *i.e.* allocative efficiency.[235] According to this Author, Bork's theory was a *trojan horse* used to deviate antitrust from its original and 'democratic' aims towards efficiency purposes, which led to a sort of antitrust policy's defusing.[236] In a similar vein, Steinbaum and Stucke affirmed that the exclusive focus on consumer welfare has *hijacked* antitrust law.[237] However, it is now fundamental trying to understand what the consumer welfare standard could mean, although, as we have previously pointed out, reaching a common consensus around this point is seen practically as an impossible task.[238]

The understanding of U.S. antitrust law's welfare standard swings between the concepts of consumer welfare and aggregate welfare, which are reached by avoiding reductions in consumers' surplus and aggregate surplus respectively. We intend consumer surplus as the delta between consumers' willingness to pay and the amount spent, whilst we refer to aggregate surplus when we add producers' surplus to consumers' one. At this end, producers' surplus is represented by the delta between the amount received by producers from buyers less the production fixed costs.[239] It is evident that this last concept does not consider wealth transfers between consumers and producers.[240] The question is what the expression consumer welfare really means? Probably, the impression that can be caught through *The Antitrust Paradox*'s lines is that Bork intended the term 'consumer welfare' as total

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[234] D.A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, cit., 837.
[235] B. Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, cit., 881.
[236] *Ibidem*.
[237] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 595-596.
[238] According to B. Orbach, *How Antitrust Lost its Goal*, cit., 2275, *the phrase "consumer welfare" has mostly served as a source of debate among scholars but has no accepted meaning in antitrust. The history of the consumer welfare standard undermines its validity and its rationalization defies common sense*. See also A. Ezrachi, *Sponge*, cit., 61.
[239] J.B. Baker, *The Antitrust Paradigm*, cit., 45. D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, Concurrences, 2017, 1, 6; B. Orbach, *The Antitrust Consumer Welfare Paradox*, Journal of Competition Law & Economics, 2010, 7, 1, 138-142; G.J. Werden, *Essays on Consumer Welfare and Competition Policy*, 2009, 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032 (accessed 5 May 2021); A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 11-12.
[240] B. Orbach, *The Antitrust Consumer Welfare Paradox*, cit., 138.

surplus.[241] The problem is that the term 'consumer' can be deceiving if intended as Bork did. In fact, under the 'consumer' category, he subsumed consumers and monopolists as well.[242] In this lies the essence of what Hildebrand called the 'Chicago trap', because you think that antitrust would benefit only consumers, while in Bork's view it can instead benefit also or even only monopolists.[243] Indeed, Bork argued that the essential objective of antitrust is *to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or no loss in consumer welfare*.[244] After having understood these key elements of Bork's view, we are able to conclude that Chicagoans and Bork saw antitrust as a mere economic tool, which shall not address goals which lies outside the pure economic realm.[245] In particular, it do not have to deal with distributional or structuralist issues.[246] Of course, we shall recognise to Bork and Chicagoans the merit of having raised the point about economic efficiency, because a pure structuralist approach could not be always appropriate, especially in markets were economies of scale play an important role. Also anchoring antitrust analysis of cases to econometric evidence shall be regarded as a merit of the Chicago School (together with the Harvard one). But shall antitrust only be aimed at increasing economic efficiency, interpreted as aggregate surplus? And, in addition, is the Chicago School economic analysis really sound and reliable? Some doubts can be casted. In particular, the Chicago gospel is based upon neoclassical economic theories, according to which market actors are completely rational. However, it seems clear that this myth of rationality cannot refer to real world situations. In particular, the fallacies of the neoclassical model have become clearer when the so-called behavioural economics have progressively taken stance, by showing that individuals, both entrepreneurs or consumers, do not act in a completely rational manner, because they can be influenced by external factors, such as personal

[241] R. Bork, *The Antitrust Paradox*, cit., 90.
[242] *Ibidem*, 110.
[243] D. Hildebrand, *The equality and social fairness objectives in EU competition law*, cit., 8.
[244] R. Bork, *The Antitrust Paradox*, cit., 91.
[245] D. Hildebrand, *The equality and social fairness objectives in EU competition law*, cit., 8-9.
[246] According to J.D. Wright and D.H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, Fordham Law Review, 2013, 81, 5, 2406, the Chicago approach *transformed the state of the law and restored intellectual coherence to a body of law Robert Bork had famously described as paradoxical*.

preferences or biases.[247] This critique may be enough to damage the Chicago approach by its very foundations. But let's go further. The belief that antitrust law is only concerned with economic efficiency and aggregate surplus is completely deceiving.[248] Of course, we should award the Chicago School for arguing that antitrust shall promote aggregate surplus, but this shall be *one* of its goals, among others, not the only and essential one. The gap between aggregate surplus and the protection of small firms and the competitive structure as such is too deep and the reason cannot lie in the Chicagoans assumptions, simply because it would signify that the Sherman Act has been applied in the wrong manner from 1890 to the advent of the Chicago School. So, if only one of two interpretations is correct, for the sake of logic, it should be the original one. However, we are not affirming here that the first interpretation of the antitrust rules was perfect and the right one, also because times evolve and also markets and their rules do so. As always, the solution can be found in the middle, according to the classical *metriotes* concept,[249] so as to find an equilibrium among all the various souls of competition law, in a sort of *aggregate coexistence* of both original and Chicago assumptions. In practice, antitrust law shall not be relegated to economic efficiency issues only, but these concerns shall be added to the original distributive and structuralist ones. With regard to enforcement, the certainty brought by the Chicagoans and Harvardians is a heritage that we have not to lose, but it shall be tailored in order to consider also extra price arguments and issues not pertaining to the pure economic discourse. These considerations – as we have already pointed out – are of particular interest in the digital markets, where structuralist problems are paired with zero or low-price products and markets. Behavioural economics can play a fundamental role in shaping this equilibrium in U.S. antitrust law. Interestingly, Baker suggested that we have not to restore the same rules applied during the so-called structuralist era,

[247] See, *inter alia*, M.E. Stucke, *Behavioral Antitrust and Monopolization*, Journal of Competition Law & Economics, 2012, 8,3, 545; A.P. Reeves and M.E. Stucke, *Behavioral Antitrust*, Indiana Law Journal, 2011, 86, 1527; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 23-24; A. Ezrachi, *Sponge*, cit., 62-63. Moreover, how strategies based on behavioural economics are used by firms to exploit consumers is well explained by A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 110-111, 206.

[248] B. Orbach, *Antitrust Populism*, cit., 11, states that *Bork went as far as offering and promoting a study of the legislative intent of the Sherman Act that is completely divorced from the record*.

[249] Intended as the classic ideal of measure and moderation, which is brilliantly represented by the expression *aurea mediocritas* by Horace, *Odes*, II, 10, 5.

but we shall restore the *bargain* that informed that period, a bargain that shall consider both efficiency and social needs.[250] We believe that the *metriotes* proposal is very close to this approach.

However, we should consider that although Bork was in favour of an aggregate welfare standard, Courts tend to adopt a consumer surplus one.[251] According to Baker, this approach shall be viewed as in line with the objective of maintaining a competitive market, even if in some cases the efficiency defences raised by firms are accepted, thus capturing also aggregate surplus.[252]

The Supreme Court soon endorsed the newly introduced consumer welfare standard.[253] For instance, in 1979, while deciding the *Reiter v. Sonotone* case,[254] the Supreme Court stated that the *Congress designed the Sherman Act as a 'consumer welfare prescription'* (directly citing Bork).[255] However, Orbach suggests that the Court could have intended the expression 'consumer welfare' in literal meaning and not according to Bork's interpretation.[256] In fact, in the *NCAA v. Board of Regents* decision[257], the Supreme Court reiterated consumer welfare as the goal of antitrust, law, but sustained that, according to it, the protection of consumers' trumps efficiency claims.[258] However, beyond the debate around the meaning which the Court conferred to the 'most abused term in modern antitrust analysis',[259] both the Supreme Court and the enforcement agencies shifted their decisional policies towards an approach more attentive to efficiency claims.

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[250] J.B. Baker, *The Antitrust Paradigm*, cit., 42.
[251] *Ibidem*, 45. D. Hildebrand, *The equality and social fairness objectives in EU competition law*, cit., 7; R. Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust*, in R. Pitosfky (Ed.), *How the Chicago School Overshot the Mark*, cit., 13.
[252] J.B. Baker, *The Antitrust Paradigm*, cit., 46.
[253] B. Orbach, *The Antitrust Consumer Welfare Paradox*, cit., 149.
[254] U.S. Supreme Court, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).
[255] *Ibidem*, at 343.
[256] B. Orbach, *The Antitrust Consumer Welfare Paradox*, cit., 149.
[257] U.S. Supreme Court, decision 2 June 1984, *NCAA v. Board of Regents*, 468 U.S. 85 (1984).
[258] U.S. 85 (1984), at 107. See also B. Orbach, *The Antitrust Consumer Welfare Paradox*, cit., 150.
[259] Quotation from J.F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, New York University Law Review, 1987, 62, 1032. On this point, see the chart 'Frequency of the Phrase "consumer welfare" In U.S. Publications in English, 1880-2008', reported by B. Orbach, *How Antitrust Lost its Goal*, cit., 2273. It is also worth noting that this expression was never mentioned by the U.S. Supreme Court in the context of an antitrust case before 1975, in United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975). On this point see M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 597.

The first episode of this shift can be seen in the *Sylvania* case,[260] when the Supreme Court allowed a vertical restraint scheme by stressing its importance for the efficiency of the relevant distribution scheme and for the benefit delivered to inter-brand competition. In doing so, the Court made explicit reference to the Chicago Scholars' works.[261] This precedent marks the abovementioned change of perspective because can be compared – although with some distinguishing features – to the previous *Schwinn* case.[262] Here, the Supreme Court held as 'per se' illegal a similar franchising scheme. Therefore, this new course saw the prevalence of efficiency considerations over the previously more rigid list of 'per se' violations. This scheme was applied also in the predatory pricing areas and in mergers, as well.

With particular reference to monopolisation and excessive market power, the described policy and enforcement shift is conspicuous if the outcome of the Department of Justice suits aimed at reaching the breakup of IBM and Microsoft is considered.[263]

The Department of Justice filed its lawsuit into IBM in 1969, by sustaining that the company adopted exclusionary and predatory conducts to maintain its monopoly power. However, the investigation, started with the ambition of breaking up IBM, was continuously prolonged and, with the Reagan era's advent, it was relinquished.[264] Here the contrast between the potential positive effects of antitrust and the non-interventionist approach is evident. Indeed, as clearly pointed out by Wu, although the case did not reach a conclusion, only the threat of an antitrust

[260] U.S. Supreme Court, decision 23 June 1977, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).
[261] G. Amato, *Il potere e l'antitrust*, cit., 29-30.
[262] U.S. Supreme Court, decision 12 June 1967, *United States v. Arnold, Schwinn & Co.*, 288 U.S. 365 (1967).
[263] T. Wu, *The Curse of Bigness*, cit., 85-86. The Author highlights the positive impact of the antitrust investigations into IBM and Microsoft. However, and despite the beneficial effects described, we intended to stress the influence of the changed political and scholar context in these investigations' final outcome. Anyhow, in this context, it is also worth mentioning the success of the proceeding started in 1974 against AT&T, at that time the world's largest firm. The investigation ended with a settlement under the Reagan Administration, thus leading to the breakup of AT&T, with the consequent opening of more markets occupied by the previous monopolist. On this point see the detailed explanation given in the mentioned book by Wu, 93-97.
[264] *Ibidem*, 88.

investigation weakened IBM's position and allowed the emergence of the software (by unbundling machines and software) and PC's markets.[265]

In a similar vein, in 1994 the Department of Justice filed its complaint against Microsoft. The company was accused of having excluded Netscape from the internet browsers' market by means of abusing its dominant position in the operative systems market. In particular, Netscape ran its own internet browser, Navigator, which was the most popular among users, but Microsoft forecasted the importance that internet browsers would have played in the whole IT sector.[266] Moreover, users had to pay $49 in order to get Navigator. Consequently, Microsoft bundled (for free) its own Internet Explorer to the Windows operating system, thus reaching the result of excluding Netscape. At this purpose, Microsoft's Group Vice-President in charge of the Platforms Group, quite tellingly, affirmed *we are going to cut off their air supply*.[267] After this move and Navigator's suppression, Microsoft's share in IBM-compatible PC browses increased from 5 percent in 1996 to over 50 percent in 1998.[268] Therefore, the U.S. Department of Justice (directed by Joel Klein, appointed during the Clinton Administration) started a monopolisation case against Microsoft. In particular, the U.S. case was expected to end with a breakup of Microsoft. However, with the election of President Bush, the parties reached a settlement and no breakup happened.[269] This case shows again how conservative economic and politic thoughts can have an influence on the outcome of antitrust enforcement. Anyhow, it demonstrates also how antitrust, also if the relevant case is not concluded with the imposition of burdensome remedies on companies, might well put pressure on the same companies, this opening the door to a more competitive environment. Probably, as well argued by Wu, without the case against Microsoft, Google, Facebook and the firms we call today 'tech

[265] *Ibidem*, 90-93.
[266] *Ibidem*, 102-103.
[267] R.J. Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy*, The MIT Press, 169. See Complaint: *U.S. v. Microsoft*, para 16, available at https://www.justice.gov/atr/complaint-us-v-microsoft-corp (accessed 30 June 2021).
[268] R.J. Gilbert, *Innovation Matters*, cit., 170.
[269] T. Wu, *The Curse of Bigness*, cit., 106-107.

giants' would not have reached their position, because the web would have been dominated by the sole – enormous – Microsoft.[270]

However, these cases also confirm the existence of a sort of political influence behind U.S. antitrust. This, during the last forty years, has favoured a non-interventionist approach on antitrust matters.[271] Evidence, as an example, comes from the fact that under the George W. Bush administration no monopolisation cases were brought, and any mega-merger was stopped.[272] More deeply, as noted by Steinbaum and Stucke, only one noteworthy monopolisation case, the one against Microsoft, was filed by the Department of Justice during the past twenty years.[273]

From the Judiciary side, this conservative approach is evident from the ever-higher hurdles placed on plaintiffs who start a private antitrust lawsuit (on this see chapter 5, part III) or in the restrictive interpretation given by Courts to the constitutive elements of some of the most discussed antitrust offences. For instance, if we take predatory pricing, a perfect example of the Court's conservative approach is the restrictive interpretation given to the recoupment requirement in the 1993 *Brooke Group* decision.[274] According to this judgement, a plaintiff willing to prove a predation scheme must demonstrate that predation losses has been recovered in the period after the relevant predatory scheme.[275] It is obvious that this requirement

[270] *Ibidem*, 105.
[271] For an exhaustive and concise overview about the enforcement of antitrust rules from the Reagan administration to the present days, see D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 8-13. The Author sustained that also Democratic administrations under Presidents Clinton and Obama made *more talk than action* about antitrust enforcement. Also, the expectations raised by the Antitrust Modernization Commission's establishment by means of the 2002 Antitrust Modernization Commission Act under the George W. Bush presidency did not lead to noteworthy changes in U.S. antitrust legislation or enforcement. See also C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 222. On the Antitrust Modernization Commission's outcome see also B. Orbach, *Antitrust Populism*, cit., 22.
[272] T. Wu, *The Curse of Bigness*, cit., 118.
[273] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 599.
[274] U.S. Supreme Court, decision 21 June 1993, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209. See also U.S. Supreme Court, decision 26 March 1986, *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See L. Khan, *Amazon's Antitrust Paradox*, The Yale Law Journal, 2017, 126, 727-730.
[275] C. Scott Memphill and P.J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, The Yale Law Journal, 2018, 127, 2049, 2051; S. Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, Berkeley Business Law Journal, 2015, 12, 82.

results in a very high evidentiary burden for plaintiffs willing to succeed in an antitrust case, especially in stand-alone actions. The Court defended its conservative view by sustaining that without recoupment *predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced*.[276] Indeed, the same Court stressed *the general implausibility of predatory pricing*.[277] This assumption relies on the twofold risk that a 'predator' bears, which consists in the risk of failure if the 'preys' would not leave the market, the future scarce desirability of its products and the possibility that the monopoly prices it would charge after the competitors' exit would incentivise new entry.[278]

Although this judgement's *dictum* could be confined to the particular context of the claim at stake, referred to a conspiracy in an oligopolistic market,[279] the number of monopolisation cases involving predatory pricing has dropped significantly after *Brooke Group*.[280] The critique that can be advanced to the approach followed by the Supreme Court is to have deeply relied on the Chicago School's efficiency claims. In particular, requesting that plaintiffs must prove a monetary recoupment might ignore that sometimes companies prefer suffering losses in order not to lose market share's portions or for eliminating potential competitors, both in oligopolistic and monopolistic markets.[281] Moreover, and outside the sole predatory

[276] 509 U.S. 209, at 224.
[277] 509 U.S. 209, at 227.
[278] J.B. Baker, *Predatory Pricing after Brooke Group: An Economic Perspective*, Antitrust Law Journal, 1994, 62, 586-587. It is worth highlighting that the Author, at p. 592, affirmed that the Supreme Court's decision stood against the contemporary economic developments about predatory pricing.
[279] L. Kaplow, *Recoupment, Market Power, and Predatory Pricing*, Harvard Law School Discussion Paper No. 967, 2018, 5-6, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_967.pdf (accessed 27 April 2021).
[280] L. Khan, *Amazon's Antitrust Paradox*, cit., 730. Although C. Scott Memphill and P.J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, cit., 2063, sustain that predation cases *are not hopeless*, and they suggest an innovative interpretation of *Brooke Group* in order to adapt the predation test to the circumstances of the specific case at stake.
[281] S. Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, cit., 84-98, suggests that empirical research provides evidence of successful predation practices in multitude of markets, with the aim of preserving or increasing the dominant firm's market power. The Author suggests also that, with particular reference to innovation driven industries, a lenient approach – originated by the will of avoiding 'false positives' – to monopolist acting in an anticompetitive way *may create greater economic harms, such as reduced consumer choice and diminished innovation in the long run*. He also suggested, at pp. 98-104, a revised predation test based upon the proof of the defendant market share and a rebuttable presumption of predation based on evidence that the defendant priced a substantial volume of commerce a. below

pricing perimeter, the strict approach that the Supreme Court adopted in antitrust issues led to an indicative decrease in the number of private antitrust claims filed. This empirical evidence, according to Stucke, clearly reveals *the failings of the Court's current standard*.[282]

The efficiency-oriented direction assumed by the Supreme Court was confirmed, *inter alia*, in two other significant judgements, *Leegin*[283] and *Trinko*.[284] In *Leegin*, the Supreme Court overruled the 1911 *Dr. Miles* precedent,[285] according to which resale price maintenance was considered a *per se* violation. According to the Court's opinion, this practice allows a more efficient management of the distribution chain and disincentivizes free riding.[286] In particular, the Court stressed the pro-competitive features of resale price maintenance, whilst anticompetitive effects shall be investigated through a rule of reason approach.[287] Justice Breyer dissented with the Court's majority opinion delivered by Justice Kennedy. He sustained that in order to overrule the *Dr. Miles* precedent, evidence was needed about the detrimental effects of free riding, so as to warrant legal protection against it.[288] Justice Breyer argued that in order to overrule the mentioned precedent evidence about the negative effects on consumers of a *per se* rule regarding resale price maintenance was needed.[289] He sustained that empirical data suggests a rise in prices when resale price maintenance is applied,[290] thus leading to the conclusion that *the only safe predictions to make about today's decision are that it will likely raise the price of goods at retail*.[291]

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its average avoidable cost or b. below long run average incremental cost, together with a reasonable probability of causing harm to consumers.

[282] M.E. Stucke, *Should the Government Prosecute Monopolies?*, cit., 540-542. With reference to the decrease in the number of private antitrust litigation see the chart reported at p. 541.

[283] U.S. Supreme Court, decision 28 June 2007, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

[284] 540 U.S. 398 (2004) 305 F.3d 89.

[285] U.S. Supreme Court, decision 3 April 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[286] 551 U.S. 877 (2007), Justice Kennedy opinion, at III A.

[287] *Ibidem*, at III C and IV B.

[288] 551 U.S. 877 (2007), Justice Breyer dissenting opinion, at I.

[289] *Ibidem*, at II B, stating that *both the Congress and the FTC, unlike courts, are well-equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the per se rule will outweigh the costs*. See also E.M. Fox, *The Efficiency Paradox*, cit., 85.

[290] *Ibidem*, at I. See also E.M. Fox, *The Efficiency Paradox*, cit., 85-86.

[291] *Ibidem*, at II B.

In *Trinko*, by means of the famous opinion delivered by Justice Scalia, the Court expressed what is probably its most monopoly/efficiency-friendly opinion. In particular, the Court considered monopolistic behaviours as less dangerous for competition than cartels and stated that the cost of false positives suggests not to expand the perimeter of the Sherman Act Section 2 liability.[292] The case was about a refusal to deal from Verizon (previously Bell Atlantic, telecom services incumbent in the North-East and one of the 'baby bells' into which AT&T was broken-up) to local operators seeking access to the local network in order to compete according to the 1996 Telecoms Act.[293] The Court, after having distinguished[294] the present case from the *Aspen Skiing* one,[295] clearly sustained that a monopolist does not have any duty to deal with competitors and that a Court cannot impose it without a proper justification.[296] In particular, the Court stressed that under antitrust law it cannot act as a day-by-day regulator.[297] Moreover, Justice Scalia clearly stated that *the opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct*.[298] This is of course true, but the problem is represented by the narrow room left by this interpretation for such anticompetitive conducts. In particular, not recognising the duty to deal requested by the plaintiffs may well impair competition when an incumbent holds

[292] 540 U.S. 398 (2004) 305 F.3d 89, at IV.
[293] The 1996 Telecoms Act required incumbent carriers to give newcomers non-discriminatory access to the local network on a cost-plus reasonable profit basis, in order to compete. It is worth reminding that the Federal Communications Commission (FCC) found Bell Atlantic liable of violating the 1996 Telecoms Act. See E.M. Fox, *The Efficiency Paradox*, cit., 83-84.
[294] 540 U.S. 398 (2004) 305 F.3d 89, at III. See also D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 97-98.
[295] U.S. Supreme Court, decision 19 June 1985, *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985).
[296] 540 U.S. 398 (2004) 305 F.3d 89, at III and IV. In particular, at III, the Court stated that *as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"*, quoting U.S. Supreme Court, decision 2 June 1919, *United States v. Colgate & Co.*, 250 U.S. 300 (1919). However, this case was referred to a refusal to deal with retailers who do not conform with the price previously announced by the wholesaler, in absence of an intent to monopolise or maintain a monopoly position. The case distinguished the previously mentioned *Dr. Miles* decision.
[297] 540 U.S. 398 (2004) 305 F.3d 89, at IV.
[298] *Ibidem*, at III.

an excessive market power from a structural standpoint. As we will see, in the European Union, this problem is properly addressed by means of the 'special responsibility' placed upon dominant market players, which represent a proper rule directed at stimulating both competition and innovation. The opinion expressed by Justice Scalia is against influenced by efficiency considerations based on neoclassical economic assumptions. However, it is also worth considering that in this case Verizon inherited the local network, so the reference to the monopolist's 'business acumen' to innovate and generate value is not deemed quite appropriate.[299]

All the mentioned Supreme Court's decisions share a common approach influenced by efficiency considerations over structural concerns, clearly in line with Chicago oriented neoclassical economic theories.[300] The issue, as brilliantly pointed out by Professor Fox, is that this excessive research of efficiency in antitrust cases can lead to the so-called *efficiency paradox*. This concept means that the current antitrust law, driven by efficiency considerations and neoclassical economic theories, may reach the paradoxical result of favouring monopolies and, as a consequence, disincentivising innovation and, at a lesser extent, true efficiency.[301]

At this point, it is worth wondering whether these decisions and, in particular, Justice Scalia's opinion in *Trinko* are in line with the aims of the Sherman Act described above. According to Stucke, whom which we agree, not only the Court's economic thinking in *Trinko* is wrong, but it ignored *its precedent involving the Sherman Act's concerns regarding monopolies' political, social, and ethical implications*.[302] In this sense, already in 1979, during 'Chicago revolution' peak, Professor Pitofsky sustained that *it is bad history, bad policy, and bad law to exclude certain political values in interpreting antitrust law*.[303] And, with a certain

[299] E.M. Fox, *The Efficiency Paradox*, cit., 84.
[300] *Ibidem*, 81-86.
[301] *Ibidem*, 77.
[302] M.E. Stucke, *Should the Government Prosecute Monopolies?*, cit., 500. Significantly, M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 595-596, claims that antitrust laws *have been hijacked*. In a similar vein, B. Orbach, *How Antitrust Lost its Goal*, cit., 2255 stated that *at some point in the late 1970s, antitrust lost the goal of competition*.
[303] R. Pitofsky, *The Political Content of Antitrust*, University of Pennsylvania Law Review, 1979, 127, 1051. See also S. Vaheesan, *The Profund Nonsense of Consumer Welfare Antitrust*, cit., 483,

prophetical manner, he warned that *if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state to play a more intrusive role in economic affairs*.[304] And, again, *it would be unfortunate if the antitrust laws were interpreted so that they would be impotent in future times of stress to play their role as a defense against undue concentration of economic power*.[305]

The prophecy of Professor Pitofsky seems to have become real and now research is needed in order to find instruments capable of restoring a competitive structure of the market. In this sense, the mentioned standards proposed by, for instance, Professors Wu and Stucke, seems to be particularly helpful. They seem to be new remedies inspired by old problems, faced also during the first *gilded age* of monopolies. Moreover, they appear to be based on the heritage left by one of the most famous jurists that the American history knows, that is Justice Louis Brandeis. During his career he studied and faced the issue of 'bigness' and, nowadays, supporters of structural reforms in antitrust law are called – often with a negative trait – 'Neo-Brandeisians'.[306] Consequently, in order to better understand the proposals of today's progressive antitrust scholars, going into the prophetical figure of Louis Brandeis more thoroughly is much needed.

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who states that the transformation of antitrust statutes into consumer welfare provisions *was based on false history*.

[304] *Ibidem*, 1051.

[305] *Ibidem*, 1058. It is worth underlining here that Professor Pitosfky, at pp. 1058-1060, sustained also that goals like the protection of small businesses and income redistribution seems out of Antitrust law's scope. The Author sustained that antitrust law shall be focused on maintaining a competitive structure of the market. However, such a competitive structure, according to the article, can prevent unfair exploitation of small businesses. We tend to agree with Professor Pitofsky and we sustain in fact that antitrust shall tackle market power in order to preserve an open and competitive structure of the market. Anyhow, and in line with the analysis provided in chapter II, we believe that such competitive environment can deliver positive effects also with regard to income inequalities issues. See C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 263.

[306] See, for a comprehensive and concise *manifesto* of the movement, L. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, Journal of European Competition Law & Practice, 2018, 9, 3, 131. See also L. Khan, *The End of Antitrust History Revisited*, Harvard Law Review, 2020, 133, 1655; L. Khan, *Amazon's Antitrust Paradox*, cit., 710 or T. Wu, *The Curse of Bigness*, cit. An interesting description of the movement is also provided by R. Pardolesi, *Hipster antitrust e sconvolgimenti tettonici: back to the future?*, Mercato Concorrenza Regole, 2019, 1, 81.

5. A prophetical figure and his heritage: Justice Louis D. Brandeis

Justice Louis D. Brandeis is one of the most popular and debated figure in the U.S. antitrust history. As we will see in this paragraph, he gave an important contribution to the development of American antitrust law, both as a lawyer and then, after the appointment by President Wilson in 1916, as a U.S. Supreme Court judge.

Justice Brandeis, however, it is not only known for his fundamental contribution to the antitrust discourse. Together with Samuel Warren, he published in the *Harvard Law Review* the milestone article *The Right to Privacy*,[307] which, according to the correct observation by Roscoe Pound (Dean of Harvard Law School from 1916 to 1936), added *nothing less than […] a chapter to our law*.[308] In addition, he is very well known for having introduced the so-called *Brandeis brief* style in drafting pleadings.[309] Such a method, which was innovative for the time, consisted in giving prominent importance to the empirical and factual context of the case, thus focusing on facts, statistics and contributions from, *inter alia*, social sciences or economics instead of scholar citations.[310] This approach was followed by Brandeis also after his appointment at the Supreme Court and it was fundamental in innovating U.S. law at the beginning of the XX Century.[311] Indeed, according to Schwartz, *Justice Brandeis himself was the prime exemplar of the new jurist in action* and he played a prominent role in freeing the concept of liberty from the bare *laissez-faire* approach.[312]

However, we are here more concerned about the contribution that Justice Brandeis provided with regard to antitrust law. His opposition to bigness, in all its forms,[313] represents a fundamental interpretation of Brandeis' thought, which has re-gained

[307] S.D. Warren and L.D. Brandeis, *The Right to Privacy*, Harvard Law Review, 1890, 4, 5, 193.
[308] Letter from Roscoe Pound to William Chilton, reported in A.T. Mason, *Brandeis, A Free Man's Life*, Viking Press, 1956, 70. This statement is cited, *inter alia*, in R.A. Costello, *Warren and Brandeis and The Right to Privacy's Hollow Core*, King's Inns Law Review, 2015, 5, 143 and B.E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, Tennessee Law Review, 2002, 69, 623.
[309] J. Rosen, *Louis D. Brandeis: American Prophet*, Yale University Press, 2016, 7, 54, 189-190; M.I. Urofsky, *Louis D. Brandeis: A Life*, Pantheon, 2009, 217, 220-221.
[310] *Ibidem*. See also B. Schwartz, *A History of the Supreme Court*, Oxford University Press, 1993, 215-216.
[311] B. Schwartz, *A History of the Supreme Court*, cit., 215-216.
[312] *Ibidem*.
[313] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 1, 5, 71-75, 116.

importance due to the evolution of the so-called *Neo-Brandeisian* movement, which calls for a more interventionist antitrust enforcement in the U.S. Through this paragraph, the conception of antitrust law advanced by Justice Brandeis will be analysed to gain knowledge and hints from his brilliant interpretations as well with the aim of contextualising the quests of the scholars who are suggesting reforms of U.S. antitrust law based on Brandeis' thought. This represents the final stage in our trip through the evolution of U.S. antitrust law and it shows how ideas advanced exactly a century ago are returning in the current debate, in a sort of cyclic return of policy ideas, which, in the end, might represent the right image of U.S. antitrust policy's history. However, in order to deal with this final part, it is essential to start with a brief overview of Louis Brandeis' life and legal conceptions, two aspects which are interlocked in this figure.[314]

Louis Brandeis was born in the small town of Louisville, in Kentucky. His father, a Czech immigrant, was a farmer and then a quite successful entrepreneur. The economic context observed by Brandeis in his family and in Louisville was fundamental for the development of his concept of 'economic democracy'.[315] Indeed, Louisville's economic environment, populated by few small firms, represented a fundamental term of comparison vis-à-vis the economic and financial concentration of power that Brandeis would have tried to contrast in his future career.[316] In particular, as reported by biographer Urofsky, the figure of Adolph Brandies, his father, was highly influential in Louis' political thought.[317] Indeed, his father represented the perfect entrepreneurial model, *i.e.*, a man running a business honestly and for the well-being of his family, his employees and, in the end, the city and the context in which it operates.[318] With this ideal of business in mind, Louis experienced directly the *curse of bigness* when several Brandeis father's clients were left bankrupt by the eastern banks failure in 1873.[319] Subsequently, when he practiced as lawyer in Boston, the majority of his clients

[314] T. Wu, *The Curse of Bigness*, cit., 59. See also J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 11, 27-29.
[315] T. Wu, *The Curse of Bigness*, cit., 59-60.
[316] *Ibidem*, 59-60.
[317] M.I. Urofsky, *Louis D. Brandeis: A Life*, cit., 15.
[318] *Ibidem*.
[319] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 33.

were middle class entrepreneurs, which suffered from the excessive power exercised by the even greater big trusts. As Tim Wu points out, concentration was like a natural force, with the consequence that small and medium businesses were seen *as unfit to survive the industrial life*.[320] This image reminds the current economic situation, where several traditional businesses cannot survive the massive competition from big corporations and are seen as inadequate for the future.

Brandeis, in particular, was concerned by the increasing concentration and financialization of the economy, where big banks – acting both as investment and commercial bankers – could 'gamble' with their clients' money, which he called *other people's money*.[321]

Louis Brandeis' conception of socio-economic relationships was a sort of *metriotes* between *laissez-faire* and socialism, which – however – he both rejected. He believed in a sort of equilibrium between workers' and capitalists' needs, where both parties could negotiate from an equal level.[322] This concept is brilliantly expressed by Melvin Urofsky, which wrote that *Brandeis believed in a system of private enterprise in which entrepreneurs could wager their talents to build up successful businesses in which investors could put their money in the hope of making more money. But there had to be a level playing field, and all groups – investors, businessmen, and workers – had to recognize that the interest of the public took precedence over their own*.[323] Urofksy then adds that Brandeis did not call for a compete subversion of the system, *but only to ensure that all companies, no matter how big or small, played the same set of rules and did nothing to harm the public*.[324] This description – which emphasizes the concept that economic and business activity shall be carried out in a *social* way, for the primary benefit of the society – is essential in order to understand Brandeis' view of economy and, consequently, of competition. In fact, Brandeis sustained the necessity for a regime

[320] T. Wu, *The Curse of Bigness*, cit.
[321] L.D. Brandeis, *Other People's Money, and How the Bankers Use It*, 1914, 1995 reprint by Bedford Books of St. Martin's Press.
[322] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 43, 49-50.
[323] M.I. Urofsky, *Louis D. Brandeis: A Life*, cit., 134.
[324] *Ibidem*.

that could have benefitted all the people.[325] In particular, social issues were at the centre of Brandeis' thinking due to its concept of life as centred on the development of each individual's personality, for her/his benefit and that of the whole society.[326] According to Brandeis, indeed, *individuals have the right to live, and not merely to exist*.[327] However, the individuals' realisation cannot be reached if they are not independent, both from State oppression and private power.[328] In fact, he argued that *men are not free, if dependent industrially upon the arbitrary will of another*.[329]

We believe that Brandeis' attention for the implication of business behaviours on the society as a whole are central in our discourse about the need for a change of perspective in competition policy, especially if linked to the rising inequality outlined in chapter 2 of this work. Furthermore, Brandeis also suggested a cure similar for its shape – although different in practice – to those proposed by Atkinson or Piketty and analysed in the same chapter 2, *i.e.*, taxation. Brandeis' view on this point can be summarised by the brilliant dissenting opinion delivered in the *Liggett v. Lee* decision.[330] In this case, he supported the introduction of a tax upon chain drugstores in Florida. It is worth pointing out – in general and not in relation to the

[325] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 87-88, where a brilliant step of Brandeis' confirmation hearing is reported (*2 Nomination of Louis D. Brandeis: Hearings Before Subcomm. Of the S. Comm. On the Judiciary on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States*, 64th Cong. 124 (1916)). In particular, Brandeis sustained that *the public interest is made up of a number of things. It is made up in the first place, or in the last, whichever you put it, of the consumer, that he should get a good article at the lowest price that he reasonably can, consistently with the good quality and good business*. However, Brandeis continued, *there is another interest that the public has, and that we should look out for, namely the interest of the rest of the public, the dealer and his clerks and the producer and his employees. […] We are all part of the public and we must find a rule of law that is consistent with the welfare of all the people*.

[326] T. Wu, *The Curse of Bigness*, cit., 64; J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 48. In particular Brandeis stated that *the final end of the State was to make men free to develop their faculties* (L.D. Brandeis, concurring opinion in U.S. Supreme Court, *Whitney v. California*, 274 U.S. 357, 375 (1927)) and that the American ideals are *the development of the individual for his own and the common good; - the development of the individual through liberty and the attainment of the common good through democracy and social justice* (L.D. Brandeis, *True Americanism*, Address of Louis D. Brandeis at Faneuil Hall, Boston, 5 July 1915, available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-22, accessed 27 March 2021).

[327] L.D. Brandeis, *Efficiency and Social Ideals*, The Independent, 30 November 1914, quoted by T. Wu, *The Curse of Bigness*, cit., 65.

[328] G. Pitruzzella, *Democracy, Inequality and Antitrust*, Antitrust & Public Policy, 2019, 0, 1.

[329] L.D. Brandeis, *True Americanism*, cit.

[330] U.S. Supreme Court, *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) at 541.

Liggett case – that Brandeis sustained a sort of 'taxation of bigness',[331] which can be described as a tax on the excess of profits.[332] Today we could imagine that such a tax can be charged on markups. He claimed that if big businesses were so efficient as they claimed, they could well afford this tax,[333] which was in the interest of the whole community. Particularly explanatory about Brandeis' 'social view' is the passage where he affirms that *there is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that, by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired, and human happiness lessened*.[334]

In the field of competition law, the *metriotes* expressed above with regard to the generality of business activities, was the concept of *regulated competition*,[335] which, according to Brandeis, represented the alternative to State dirigisme and excessive *laissez-faire*.[336] This point of equilibrium, according to Rosen, well represents Brandeis' will *to keep business out of government and government out of business*.[337] In his view, as a result of the increasing concentration of private power into big corporations, the State should have the power to limit this trend, also by breaking up companies or preventing the creation of monopolies.[338] Indeed,

[331] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 83. As the Author points out at pp. 74-75, it is curious to note that Brandeis, as a proper *prophet*, suggested to overcome the constitutional hurdles of regulating interstate commerce and state banks, insurance companies and railroads through taxation. This approach resembles that adopted by the Chief Justice Roberts in the famous 2012 decision about the *Affordable Care Act*, best known as *Obamacare* (U.S. Supreme Court, decision 28 June 2012, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)).

[332] M.I. Urofsky, *Louis D. Brandeis: A Life*, cit., 671.

[333] *Ibidem*.

[334] U.S. Supreme Court, *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) at 580.

[335] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 47, 62-63. See L.D. Brandeis, *The Regulation of Competition Against the Regulation of Monopolies*, in O.K. Fraenkel (Ed.), *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis*, cit., 109 and L.D. Brandeis, *Letter to Alice G. Brandeis*, 15 November 1911, in M.I. Urofsky and D.W. Levy (Eds.), *The Family Letters of Louis D. Brandeis*, University of Oklahoma Press, 2002, 175. In this letter, Brandeis stated that *no regulated monopoly of the capitalists. Either competition or State Socialism. Regulate competition, not monopoly is my slogan*.

[336] *Ibidem*.

[337] *Ibidem*, 47.

[338] *Idibem*, 51, 62-63. See, in particular footnotes 75 and 76 at p. 51.

according to Brandeis, *absolute power inevitably leads to abuse*[339] and monopolies represented an excessive concentration of political, economic and financial power dangerous for freedom and – consequently – democracy.[340] Brandeis' thought was central in the 1912 campaign and the regulation of competition was endorsed by the future 28th U.S. President Woodrow Wilson, who was directly advised by Brandeis himself.[341] Brandeis and Wilson's program was opposed to the regulation of monopolies advanced by Theodore Roosevelt. In this context, Brandeis argued that they had a program of *liberty*, whilst Roosevelt advanced a program of *regulation*.[342] This point is central to understand Brandeis' thought and adapt it to the present days.

However, the Brandeisian view can be opposed by who sustains that monopolies, in certain situations, might prove efficient or, like the Supreme Court did while deciding the *Trinko* case, that they attract *business acumen*.[343] Brandeis, which not casually has been mentioned *American Prophet* by Jeffrey Rosen, had a response also for this observation and his formulation goes directly at the foundations of U.S. antitrust law, thus being essential four our purpose of understanding the goals that lies behind this field of law. Whilst in the last decades – especially after the release of Robert Bork's *The Antitrust Paradox* and the advent of the Chicago School – we think at competition policy only as a policy aimed at enhancing economic

[339] L.D. Brandeis, *The New England Transportation Monopoly*, an address delivered before the New England Dry Goods Association at Boston, 11 February 1908, available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-16 (accessed 27 March 2021).

[340] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 62-63; M.I. Urofsky, *Louis D. Brandeis: A Life*, cit., 306-309, 321-322, 351. Urofsky, at p. 308, reports also an interesting passage by Brandeis, who, in 1912, stated *I used to think there were 'good trusts', that there were big men at the head of some of them and that they worked things out for the benefit of the community. I know better now. There are no good trusts*.

[341] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 62-63.

[342] *Ibidem*, 63, mentioning J. Chace, *1912: Wilson, Roosevelt, Taft and Debs – The Election That Changed the Country*, Simon & Schuster, 2005, 195.

[343] U.S. Supreme Court, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, (02-682) 540 U.S. 398 (2004) 305 F.3d 89. For an opinion on this judgement in line with our thesis and against the 'praise' for monopolies expressed in particular by Justice A. Scalia, see M.E. Stucke, *Should the Government Prosecute Monopolies?*, University of Illinois Law Review, 2009, 2, 497, available at https://www.illinoislawreview.org/wp-content/ilr-content/articles/2009/2/Stucke.pdf (accessed 20 February 2021) and University of Tennessee College of Law, Legal Studies Research Paper Series n. 79, 2009, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1489974_code869490.pdf?abstractid=1116463&mirid=1 (accessed 20 February 2021).

efficiency, Louis Brandeis thought at efficiency from a social point of view, which aimed at the common good, as observed above. Furthermore, he believed that if a firm consolidates beyond a certain size, rather than becoming more efficient, it will turn to be inefficient.[344] Moreover, he thought that efficiency could have been reached also through a harmonious environment in the workplace, between employers and employees.[345] This could have been achieved through the collaborative approach mentioned above, which is hard to establish where a considerable imbalance of power between the parties is present.

Finally, it is worth noting how Brandeis' influence was also central in suggesting the enforcement method that should have proved preferable for regulating competition. In particular, he claimed for independent regulation aimed at preventing the creation of monopolies, thus not relying on judicial enforcement only.[346]

In conclusion, we can affirm that the rejection of excessive economic freedom and, consequently, of excessive competition is an essential part of the Brandeis' discourse, as he believed that an *overdose* of competition[347] will destroy it, thus leading to monopolies.[348] This view seems to suggest a *noble* concept of competition, which, for the present days, has been brilliantly proposed by Professors Ezrachi and Stucke.[349] As for Justice Brandeis and his time, maybe the most representative image of his ideal of *noble* competition is his dissenting opinion in the *American Column* case.[350] The case involved a plan by small businesses to restrict production, in absence of an explicit price-fixing agreement.[351] In contrast with the majority, Brandeis argued that such a behaviour by small businesses was essential for them to counterbalance the information asymmetries which could gave favoured big corporations. According to Brandeis, the plan by the small producers

[344] M.I. Urofsky, *Louis D. Brandeis: A Life*, cit., 191.
[345] *Ibidem*, 238-239, 294-295.
[346] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 64.
[347] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit.
[348] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 64. See also L.D. Brandeis, *The Regulation of Competition Against the Regulation of Monopoly*, cit., 109.
[349] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 254.
[350] U.S. Supreme Court, *American Column & Lumber Co. V. United States*, 257 U.S. 377 (1921) at 413.
[351] J. Rosen, *Louis D. Brandeis: American Prophet*, cit., 107-108.

was needed in order *to make rational competition possible by supplying data not otherwise available, and without which most of those engaged in the trade would be unable to trade intelligently*.[352] He then added that the Sherman Act purpose *was merely to prevent restraint. The illegality of a combination under the Sherman Law lies not in its effect upon the price level, but in the coercion thereby affected*.[353] In his words *the cooperation which is incident to this plan does not suppress competition. On the contrary, it tends to promote al in competition which is desirable. By substituting knowledge for ignorance, rumor, guess, and suspicion […]. In making such knowledge available to the smallest concern, it creates among producers equality of opportunity*.[354]

With all the necessary *caveats*, the view of competition proposed by Brandeis in the *American Column* case seems surprisingly actual for our purposes. Of course, it cannot be applied today in its entirety and without accurate reflections. Economic analysis, quite absent in this case, must be carried out scrupulously and every conduct shall be weighed precisely.[355] However, Brandeis' considerations about the role of price and the dangers of information asymmetries due to excessive market power are astonishing, if we consider that Brandeis wrote his opinion 100 years ago. Indeed, as we will see, today we are relying on an excessive price-centric approach to competition, whilst the free or nominal products market is challenging this paradigm. The suggestion that the illegality of a conduct is not merely related to the effect on the price level might be taken into great consideration for our purposes. Likewise, the distinction that Brandeis made about the different *status* in the market played by small producers and big companies is telling and it deserves further reflection. Of course, as we pointed out, all has to be contextualised into a detailed economic assessment of each single case, but the inclusion of structural consideration into the analysis of a case does not seem worrisome. In particular, it aims at pursuing the abovementioned noble competition ideal, by establishing if a conduct is anticompetitive based on the effect that *in practice* it operates on the

[352] U.S. Supreme Court, *American Column & Lumber Co. V. United States*, at 415.
[353] *Ibidem*, at 417-418.
[354] *Ibidem*, at 418.
[355] Indeed, as put by A. Ezrachi, *Sponge*, cit., 64, *the 'economisation' of competition law provides a valuable common benchmark for enforcement and, while not monolithic, it does put forward a body of accepted principles*.

relevant market. This point could be better understood, however, if analysed from a specular standpoint with respect of that of Brandeis. He sustained that the 'cooperation' between the small producers was not unlawful. But that was the particular case under the Supreme Court scrutiny. From our standpoint, we argue if an inverse reasoning could be possible, *i.e.*, based on bigness and the possession of a huge amount of data. Some could dismiss this sentence by stating that the system is still working in this fashion, and it is also based on strong economic analysis.[356] But is this true? Is the current state of competition law fit for challenging the XXI 'big trusts'? Sincerely, we have some doubts, and we are not alone. This approach, which is more focused on the structure of competition, reminds the mentioned enforcement standards advanced by Wu or Stucke and Steinbaum.[357] Moreover, also Professors Baker and Salop suggested, as a policy option, the possibility of adopting – in that case – inequality as a specific enforcement goal.[358]

In the end, we described the inspiring and telling story of Justice Brandeis because we believe, that, although one agrees or disagrees with him, he was a real prophet for the American society and for better enlightening what are the real goals of U.S. antitrust law. Given the outstanding work of such a distinguished lawyer, what we have to do is only to preserve his heritage and to learn from it. His 'advice' may prove fundamental in in designing a new approach to competition law fit for the contemporary new age.

In conclusion of this overview over the evolution of U.S. antitrust law, we believe that there cannot be efficiency without fairness in the market and, if antitrust is a policy aimed at improving a Nation's economic performance, there cannot be

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[356] A critic on the *Neo-Brandeisian* movement, referring to the need for an open to *fact-based, empirical antitrust* (p. 539) reliant on strong economic analysis has been advanced by D.A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, The Antitrust Bulletin, 2019, 64, 4, 531.

[357] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, The University of Chicago Law Review, 2019, 86, 595, available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6188&context=uclrev (accessed 17 March 2021); M.E. Stucke, *Invited Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law*, 13 March 2020, available at https://judiciary.house.gov/uploadedfiles/submission_from_maurice_stucke.pdf (accessed 17 March 2021). See also M.E. Stucke and A. Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, Harvard Business Review, 15 December 2017, available at https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement (accessed 17 March 2021); T. Wu, *The Curse of Bigness*, cit., 160.

[358] J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, cit., 24

economic development without society's empowerment. In a nutshell, let's maintain antitrust law's economic background, let's promote efficiency, but into the portrait of a policy aimed first at promoting economic wellness through a competitive structure of the market. It is indeed the same Adam Smith – who *laissez-faire* theorists assume as a guide with his *invisible hand* – that in *The Theory of Moral Sentiments* stressed the importance of fairness and altruism as virtues that play a prominent role in market interactions, as they allow trust and material gains in the market.[359]

[359] N. Ashraf, C.F. Camerer and G. Loewenstein, *Adam Smith, Behavioral Economist*, The Journal of Economic Perspectives, 2005, 19, 3, 136, quoted by A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 236-237.

4

The foundations of EU competition law

EU competition rules do not prevent dominant companies […] from offering low prices to their customers. But dominant companies have a special responsibility not to impair competition in the internal market. They can sell at low prices but cannot sell below cost with the intention of eliminating a competitor. This is not competition on the merits.[360]

This chapter deepens our analysis into the origins and the development of competition law in the European Union. While the previous chapter was centred on the goals that animated the debate leading to the Sherman Act's enactment as well the subsequent interpretations given by the U.S. Supreme Court and the assumptions of leading American scholars, here we will observe what we can call the 'common seed' between U.S. antitrust law and EU competition law, but, at the same time, the very independent development of the latter regime. We will observe how the European system is not rooted into the deep political discourse that

[360] EU Commission Executive Vice-President Margrethe Vestager, *Statement by Commissioner Vestager on Commission decision to fine Qualcomm for engaging in predatory pricing*, 18 July 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_4371 (accessed 19 March 2021).

originated U.S. antitrust law and its enforcement during the first decades. Contrarywise, European competition law appears to be shaped as an administrative system, often perceived as excessively technical and without a proper 'political soul'.[361] However, during the years, it has created the so-called 'European way' to competition law,[362] which can be central in our discourse about a modernisation of competition rules in function of a more sustainable economy. As we will see, the interpretation of articles 101 and 102 TFEU given primarily by the Court of Justice appears more focused than the observed current U.S. interpretation on the value of competition as such, or, in Ordoliberals terms, in competition as an institution.[363] In order to better understand the evolution of EU competition law it is worth underlining, as pointed out by Ibáñez Colomo and Kalintiri, how the objectives of competition law are defined on an *ex post* incremental basis and not by means of an *ex ante* choice.[364] In particular, competition law *can evolve in ways that were not necessarily anticipated at the time of the enactment of the provisions*.[365] Consistently with this assumption, it is deemed appropriate to analyse the evolution of EU competition law by means of an historical approach, focused on the problem of market concentration before World War II, the European Economic Community's establishment and the development of an internal market, the subsequent developments and, finally, the perceived need for a 'more economic approach', until the necessity of a reform in order to manage the current economic and social challenges.

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[361] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 248-249; C. Osti, *Ritorno al contenuto politico della concorrenza*, in M. Graziadei and M. Serio (Eds.), *Regolare la complessità. Giornate di studio in onore di Antonio Gambaro. Atti del V Congresso nazionale SIRD. Trapani 24-25 giugno 2016*, Giappichelli, 2017, 51-52.

[362] M. Botta and S. Solidoro, *Hipster Antitrust, the European Way?*, European University Institute, Florence Competition Programme Policy Brief, Issue 2020/02, 2020, available at https://cadmus.eui.eu/bitstream/handle/1814/65747/PB_2020_02_FCP.pdf?sequence=1&isAllowed=y (accessed 30 April 2021).

[363] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 241-242, 245-247; C. Osti, *Ritorno al contenuto politico della concorrenza*, cit., 52-55. R.D. Blair and D.D. Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, cit., 2502, underline also how EU competition law has *a more distributive flavor than its American counterpart*.

[364] P. Ibáñez Colomo and A. Kalintiri, *The Evolution of EU Antitrust Policy: 1966-2017*, The Modern Law Review, 2020, 2.

[365] *Ibidem*. On this point see also Sir P. Roth, *The continual evolution of competition law*, Journal of Antitrust Enforcement, 2019, 7, 21, who sustains that in the development of EU competition law, the ECJ behaved like a common law court in *moving it [competition law] forward incrementally and sometimes developing new principles*.

1. The European context's necessary premise: Market concentration before World War II

Our analysis about the European competition law regime starts with an historical reference. Indeed, we cannot properly understand the creation of the Community competition rules without addressing the increased cartelisation and market power characterising the period before World War II, particularly in Germany.

After World War, Germany was facing a difficult financial downturn. In 1923 inflation increased dramatically, as well as the pressure on the already weak Weimar Republic for governmental intervention.[366] The newly appointed Chancellor Stresemann announced and then passed a regulation against cartels, the Regulation Against Abuse of Economic Power Positions. As noted by Gerber, this statute is the first example – with all the exceptions needed – of general competition regulation in Europe.[367] The aim of this legislation was inflation's reduction by means of empowering freedom on the market.[368] However, this regulation was passed by the government with emergency powers, without involving the Parliament. This, according to Gerber, undermined its legitimacy and effectiveness, as well.[369] In fact, it is reported that the application of this regulation suffered of several weaknesses. In particular, the specialised Cartel Court adopted a sort of cartel-friendly interpretation of the relevant provisions.[370] Moreover, the 'informal' enforcement procedure – eminently an administrative proceeding – was characterised by a tendency to reach a compromise between enforcers and businesses. Indeed, firms valued stability greatly, whilst enforcers sought to address – at a certain extent – the economic decisional process.[371] Moreover, this regulation was not aimed at reducing cartelisation and market concentration, but at avoiding abusive conducts by cartels. This weak approach was maintained also due to the

[366] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, Oxford University Press, 1998, 123.
[367] *Ibidem*, 123-124.
[368] *Ibidem*, 124.
[369] *Ibidem*.
[370] *Ibidem*, 129-132.
[371] *Ibidem*, 132-134.

weak political legitimation of the Weimar republic and, consequently, cartelisation did not decrease, but – contrarily – increased while this statute was in force.[372]

Subsequently, in the context of the 1929 crisis, this regulation was partially amended, and an important slice of powers was transferred to the economics ministry.[373] Most importantly, when the National Socialist party took power in 1933, the new regime followed a policy aimed at incentivising cartelisation and concentration of power. Industrial conglomerates were intended to serve the regime's policies as part of the State's system.[374] In particular, Germany's biggest firms, at a certain point, supported Hitler's Nazi party in return of the stability that the newly established regime had promised to leading industrials. Indeed, as reported by Wu, at the beginning of Hitler's ascent to power, German industrials were not much in favour of his movement. However, the dramatic economic downturn and the consequent instability led them preferring to support the Nazi party in exchange of stability and as a defence against the risk of a communist revolution.[375] One of the means used by the regime in order to gain the industrials' support was the *Reprivatiesierung* ('reprivatisation'), that consisted in granting back to private firms strategic monopolies then controlled by the State. This, of course, increased market concentration and the consequent support to the Nazi regime.[376]

The high concentration rate of the German economy then eased its transformation by the Nazi regime into a 'capitalist planned economy', where property rights were maintained, but the State had the right to intervene into the economic arena, if deemed necessary for the needs of the nation.[377] What is important to understand from this story is how a concentrated market – together with the weaknesses of the Weimar Republic – aided Hitler and the Nazi party in obtaining power, maintaining it firmly and, unfortunately, but tellingly, bringing the whole planet into World War

[372] *Ibidem*, 134-135. See also, generally, T. Wu, *The Curse of Bigness*, cit., 35, referring to 'rationalisations' with regard to cartels and big mergers leading to great industrial concentrations.
[373] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 147.
[374] *Ibidem*.
[375] T. Wu, *The Curse of Bigness*, cit., 35-38.
[376] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 189. See also M.Y. Sweezy, *The Structure of the Nazi Economy*, Harvard University Press, 1941, 27-28.
[377] T. Wu, *The Curse of Bigness*, cit., 39-40. A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 189.

II. This, as stressed by Wu while going back over these events, *is the lesson that cannot be ignored in our times*.[378]

2. Preventing market concentration: The drafting of EU competition rules

In the aftermath of World War II, European Countries, with the Allies' help, begun reconstructing the economic system lost because of the conflict. Also in order to avoid future conflicts, an integration process appeared a suitable solution. However, the creation of a political integration was a difficult path, whilst integration in the production of coal and steel was seen as necessary to boost the reconstruction process. In this context, however, the German situation raised concerns, because a return to a German dominant position in the coal and steel industry was strongly feared.[379] As a consequence, a common control over these industries was created in the European Coal and Steel Community ECSC), established in 1951 by means of the Treaty of Paris.[380] In this landscape, competition was intended to play a prominent role.

The narration about ECSC's competition rules is of particular historical interest and it can create a 'bridge' between U.S. antitrust rules and the soon-to-be-established European one. According to Gerber's reconstruction, the role of the U.S. in the drafting process of ECSC' competition rules occurred 'behind the scenes' and indirectly.[381] Contrarywise, if we make reference to Osti, the U.S. played a more active role.[382] Anyhow, it is certain that the central figure in this process was Jean Monnet, who deemed a proper competition law framework a necessary prerequisite to achieve the Community integration. In particular, the necessity to control the firms' power was felt and it helped also in achieving consensus among the founding Countries. In particular, France was concerned about a recovery of German firms' power, which could have been prevented if a strong competition law regime would

[378] T. Wu, *The Curse of Bigness*, cit., 41.
[379] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 336.
[380] *Ibidem*, 335-336.
[381] *Ibidem*, 338.
[382] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 237-238; C. Osti, *Ritorno al contenuto politico della concorrenza*, cit., 51-52; Sir P. Roth, *The continual evolution of competition law*, cit., 10.

have been in place.[383] The relevant provisions were drafted by Robert Bowie, a Harvard University antitrust professor, then working for the U.S. High Commissioner for Germany. Then, the provisions were translated into a European idiom by Maurice Lagrange of the French Conseil d'État.[384] According to Gerber, the U.S. role was for the most possible extent indirect, for the fear of an American influence unwelcomed by the Community's founding Countries. In particular, Gerber highlights that the provisions were revised and commented by the U.S., which, however, did not take part to the negotiation process.[385] According to Osti, instead, the input for the adoption of such a competition law regime came exactly from U.S. concerns about the ECSC's establishment. In fact, when the French foreign minister, Robert Schumann, outlined the ECSC project to the U.S. Secretary of State Acheson, the latter feared a sort of big cartel among European coal and steel producers. As a consequence, Monnet found in the establishment of a strong competition law regime the solution to U.S. fears vis-à-vis the ECSC establishment.[386]

Under a comparative law perspective, what has been reported represents a perfect example of legal transplant, thus handled with extreme accuracy and care. Indeed, the ECSC competition law provisions were drafted by a U.S. antitrust professor, thus being of course influenced by the Sherman Act and, more generally, by the U.S. system. Anyhow, such rules, quoting metaphorically the famous expression by Alessandro Manzoni, were cleaned in the Arno, *i.e.*, they were adapted to the European idiom and context (like Manzoni reviewed *I Promessi Sposi*'s language to adapt it to the cultured Florence idiom). This transplant is seen as particularly succeeded because, despite the initial U.S. political influence, the rules implemented in Europe were cleaned of peculiar U.S. contents, thus allowing the European competition law system growing up by itself, promoting its own goals

[383] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 337-338.
[384] *Ibidem*, 338-339; C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 238.
[385] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 338.
[386] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 237, quoting J. Monnet, *Mémoires*, Fayard, 1976, 356; C. Osti, *Ritorno al contenuto politico della concorrenza*, cit., 51-52.

and objectives and establishing an alternative structured competition regime than the U.S. one.[387]

3. EU competition law and the creation of the internal market objective

The competition provisions contained in the Treaty of Paris constituted the basis for the subsequent competition rules included in the Treaty of Rome.[388] What is evident at this point is that the creation of the European competition law regime lacks the intense political debate – occurred in the U.S. – around the values and goals that competition provisions should promote and protect. It is straightforward that the European legislation was created as a result of a political input, *i.e.* the establishment of the ECSC, then the EEC and the – direct or indirect – U.S. concerns. Anyhow, EU competition rules were not conceived as a fundamental tool in order to reach political and social ends, like the Sherman Act in the U.S. They were intended more as an instrument necessary to achieve the EEC market goals, which, in the very first decades, was the creation of the common market and the erosion of national barriers to the free movement of goods.[389] This target was also motivated by the belief that in order to compete globally with U.S. firms, the European industrial system was urged to reach a critical mass through economies of scale.[390]

According to the abovementioned approach, the first cases handled by the Commission and the Court of Justice aimed principally at protecting trade among member States. In particular, in *Consten and Grundig* Commission decision,[391] the Commission deemed contrary to competition law a behaviour aimed at dividing markets across member States' borders, although if this behaviour may have

[387] An interesting discourse about the transplant of competition rules among jurisdictions is advanced by A. Ezrachi, *Sponge*, cit., 71-75.
[388] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 237.
[389] R. Wesseling, *The Modernisation of EC Antitrust Law*, Hart Publishing, 2000, 11-12, reporting how this need was central in the Spaak Report's considerations. See also D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 352; A. Ezrachi, *Sponge*, 53; R. Whish and D. Bailey, *Competition Law*, Oxford University Press, 2018, 23-24.
[390] R. Wesseling, *The Modernisation of EC Antitrust Law*, cit., 10.
[391] European Commission, decision 23 September 1964, *Grundig-Consten*, IV-A/00004-03344, OJ 20 October 1964, 2545/64.

enhance the general level of competitiveness.[392] The same considerations, despite the rejection of the Commission's general approach, were then provided by the Court of Justice while ruling on the same case.[393]

4. Further developments and additional goals

The historical analysis proposed by Wesseling identified a second phase in the development of EU competition law, starting from the end of the 1970s and the beginning of the 1980s decade.[394] Indeed, the creation of the common market was gaining momentum and, if we refer to the 1980s, it was almost complete. Consequently, it was deemed necessary shifting the policy focus from the creation of such a market into the regulation of its functioning.[395] In this context, the Commission adopted additional economic and political values into account, especially by tailoring its decisions to the specific market concerned. This approach, centred on the concept of 'workable competition' was previously outlined by the Court of Justice's *dicta*.[396] The Court's judgements which gave room to this interpretation are the *Metro*[397] and *Walt Wilhelm*[398] cases. First, in *Walt Wilhelm*, the ECJ affirmed that *while the Treaty's primary object is to eliminate […] the obstacles to the free movement of goods within the common market and to confirm*

[392] R. Wesseling, *The Modernisation of EC Antitrust Law*, cit., 24.
[393] European Court of Justice, decision 13 July 1966, joined cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*. See also ECJ, decision 25 November 1971, case C-22/71, *Béguelin Import Co. v. S.A.G.L. Import Export*, paras 14-18; decision 8 November 1985, joined cases from C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82, *N.V. IAZ International Belgium et al. v. Commission*, paras 23, 45; decision 6 April 2006, case C-551/03 P, *General Motors BV v. Commission*, para 67-68; decision 16 September 2008, joined cases from C-468/06 to C-478/06, *Sot. Lélos kai Sia EE et al. v. GlaxoSmithKline AEVE Farmakeftikon Proïonton*, paras 65-66; decision 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission (GlaxoSmithKline)*, para 61; decision 17 February 2011, case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB (TeliaSonera)*, paras 20-21.
[394] R. Wesseling, *The Modernisation of EC Antitrust Law*, cit., 33-34.
[395] *Ibidem*, 33.
[396] *Ibidem*, 34-35. According to Wesseling (p. 35), *the degree of competition required under Community antitrust law could vary in nature and intensity according to particular features of products and markets*; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, Oxford University Press, 2019, 25.
[397] European Court of Justice, decision 25 October 1977, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*.
[398] European Court of Justice, decision 13 February 1969, case 14/68, *Walt Wilhelm et al. v. Bundeskartellamt*.

and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community.[399] Then, in *Metro* the ECJ stated that the EU competition law regime *implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic one*.[400] Here the ECJ melted the integration objective with the workable competition concept, which is better clarified in a subsequent passage of the decision. In fact, the Court then stated that *the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market*.[401] From the analysed ECJ's statements we could affirm that, together with the market unification objective, some industrial policy's considerations could justify an indirect, but positive action by the Commission. Indeed, as we have already pointed out, this second phase had regard not only to the establishment of the common market, but also to its development. These policy concerns have also justified the sectorial approach reported by Wesseling, with particular regard to crisis cartels in particular sectors, as well special exemptions in order to promote certain strategical markets, like the banking one.[402]

At this point, it is worth focusing on what concept of competition the European authorities aimed to protect. Delineating the ideal at the basis of EU competition law is a necessary task to understand both this discipline's past development and the possible policy changes needed in the present and future times, in order to adapt it to the challenges brought by the current economic scenario.

[399] *Ibidem*, para 5.
[400] ECJ, *Metro*, cit., para 20.
[401] *Ibidem*, para 21.
[402] R. Wesseling, *The Modernisation of EC Antitrust Law*, cit., 36-41.

We have already referred to the lack of political debate around the goals of competition law in Europe, but the focus on the creation and development of the internal market suggests a particular attention on the dynamics involving such a market. Indeed, the competition ideal promoted by the European institutions was centred on preserving the process of competition, on protecting competition as such, as an institution. The concept of the institutional dimension of competition is rooted in the Ordoliberals' ideas, but we will return on them later in this chapter. Anyhow, here it is central stressing that the EU system is not devoted at protecting competitors, but the competitive process, which can be identified in 'rivalry' among competitors.[403]

The focus on the structure of competition is confirmed by the ECJ's statements in the *Continental Can* judgement,[404] where the Luxembourg Judges affirmed that then article 86 of the Treaty (now article 102 TFEU) *is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure*.[405] Interestingly, the Court explained also this concept with reference to the violation of article 102 TFEU, by specifying that an *abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition*.[406] However, notwithstanding such focus on the competitive process as such, European competition law did not prove to be immune from the increasing influence of the Chicago School assumptions driven by the neoclassical economic concepts mentioned in chapter 3. Such an influence in the European context can be represented by the 'more economic approach' sustained by the Commission during the competition law renewal phase, between late 1990s and 2000s.

[403] *Ibidem*, 82-83; C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 247. See also G.J. Werden, *Essays on Consumer Welfare and Competition Policy*, 2009, 20, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032 (accessed 5 May 2021).
[404] European Court of Justice, decision 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*.
[405] *Ibidem*, para 26.
[406] *Ibidem*.

5. The modernisation of EU competition law: Towards a 'more economic approach'?

Between the end of the last millennium and the beginning of the present one, the Commission promoted what was called the 'modernisation' of EU competition rules. The most important instrument of this process is of course represented by Regulation 1/2003,[407] which, among other things, decentralised the application of EU competition rules. However, the prospected renewal was deeper and tried to introduce more economically rigorous concepts into the European competition law realm. In particular, the quest for efficiency and lower prices became central also in the European discourse and also 'consumer welfare' made its appearance as competition law's guiding principle.[408] Also EU Commissioners for competition stressed that point. Mario Monti, for instance, stated that he *put consumer welfare at the top of the agenda of competition policy in Europe*.[409] On another occasion, he explained that *competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumers*.[410] In a similar vein, his successor Neelie Kroes affirmed that *consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources*.[411]

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[407] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, published in OJ 4 January 2003, L 1/1.

[408] T. Wu, *The Curse of Bigness*, cit., 118-119; C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 243; C. Osti, *Ma a che serve l'antitrust?*, Il Foro Italiano, 2015, V, 114.

[409] Commissioner Mario Monti, *Competition for Consumers' Benefit*, speech delivered at the European Competition Day, Amsterdam, 22 October 2004, available at https://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf (accessed 2 May 2021).

[410] Commissioner Mario Monti, *The Future for Competition Policy in the European Union*, speech delivered at the Merchant Taylor's Hall, London, 9 July 2001, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_01_340 (accessed 19 October 2021).

[411] Commissioner Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, speech delivered at the *European Consumer and Competition Day*, London, 15 September 2005, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 (accessed 2 May 2021). See also the Policy Opening address at the conference *Competition and Consumers in the 21st century*, Brussels, 21 October 2009, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_486 (accessed 2 May 2021),

Having regard to the approach followed by the Commission, the 1997 Green Paper on vertical restraints reported that *the Commission has consistently demonstrated a willingness to consider economic factors such as efficiency and consumer welfare*[412] and the protection of the consumers' interest is seen as guaranteed by means of *ensuring low prices*.[413] In the Guidelines for the application of article 101 TFEU it is specifically affirmed that *the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources*.[414] Accordingly, the Guidelines for the application of article 102 TFEU report that *the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels […] or in some other form such as limiting quality or reducing consumer choice*.[415]

It is evident from the above how competition law in the EU as well has been influenced by the Chicago theories. Critically, Tim Wu affirmed that the 'Chicago virus' has 'infected' Europe, as well.[416] Anyhow, it seems that the European adaptation of Chicago assumptions has been more moderate. In particular, as we can recognise while reading the Guidelines on the application of article 102 TFEU the European approach is more focused on consumers, thus leading to the

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when Commissioner Kroes stated that *today we have the right political context for promoting consumer welfare*.

[412] Green Paper on Vertical Restraints in EC Competition Policy, COM(96) 721 final, 22 January 1997, 52, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0721&from=IT (accessed 2 May 2021).

[413] *Ibidem*, 17.

[414] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, published in OJ 27 April 2004, C 101/97, point 13, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(07)&from=EN (accessed 2 May 2021).

[415] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, published in OJ 24 February 2009, C 45/7, point 19, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224(01)&from=EN (accessed 2 May 2021). For a detailed explanation of the innovations brought with the guidelines on the application of article 102 TFEU, see P. Akman, *The Reform of the Application of Article 102 TFEU*, Antitrust Law Journal, 2016, 145 ff, who critically – and in favour of an even more economic approach – states that *the reform of Article 102 might thus be a mission not yet accomplished*.

[416] T. Wu, *The Curse of Bigness*, cit., 118.

conclusion that the European consumer welfare standard is aimed at reaching consumer surplus.[417]

However, as seen also by the abovementioned metaphor suggested by Wu, criticism has been expressed vis-à-vis the adoption of such 'more economic approach'. In particular, it has been sustained – as we saw with reference to U.S. antitrust law – that relying on economics often lead to an illusion of certainty and not to the increase in predictability just pursued with the recourse to economic analysis. This happens when a proper definition of what is competition lacks and when the difficult evaluation of long-term effects in comparison to short-term ones shall be carried out.[418] Moreover, the focus on efficiency and price levels is feared to have shifted the focus of EU competition law's enforcement from the other EU's policy objectives.[419]

6. The European concept of competition

The statement that EU competition law is rooted into a broader policy background, which is that of the EU Treaties, is fundamental for the sake of our analysis. In particular, as part of the 'economic constitution' of the EU, competition law shall be seen as integrated into the *highly competitive social market economy* system proclaimed by article 3, paragraph 3, TEU.

As well explained by Hildebrand, in the European context, much value shall be attributed to the concepts of equality and fairness. The debate around the latter term is growing in the EU context, also in the words of Commission's Executive Vice-President Vestager, according to whom *competition policy helps build a fair society. And it's been doing that since the start, sixty years ago*.[420] Though, she

[417] D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 8.
[418] J. Blockx, *The Limits of the 'More Economic' Approach to Antitrust*, World Competition, 2019, 42, 4, 484-487.
[419] *Ibidem*, 491.
[420] EU Commission Executive Vice-President Margrethe Vestager, *Fair markets in a digital world*, speech delivered at the Danish Competition and Consumer Authority, Copenhagen, 9 March 2018, available at https://wayback.archive-

specified that *we don't need to replace the whole system of rules that lawyers and economists have developed over two generation. We don't need a new rule of fairness in our system. Because fair markets are just what competition is about. Of course, that doesn't mean that competition enforcement can answer every problem. Yes, we can help to make Europe's market fairer. But we do that as part of a team*.[421]

There are however different policy options about fairness: It can be sustained that fairness is a vague concept which shall play no role in the enforcement of competition rules, whilst it shall also be regarded as an objective to pursue while evaluating the conducts, especially when new market dynamics are present.[422]

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it.org/12090/20191129214609/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world_en (accessed 4 May 2021).

[421] *Ibidem*. The same concept has been expressed by EU Commission Executive Vice-President Vestager in the speech *Fairness and competition*, delivered at the *GCLC Annual Conference*, Brussels, 25 January 2018, available at https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en (accessed 4 May 2021). Here she stated that *in our work on competition, like any good knitter, we have a pattern to follow. We have principles, rules, ways of analysing the data that lawyers and economists have been working on for decades. And that's the way we make Europe a fairer place*. During another occasion, with a more specific reference to abuse of dominance and the so-called 'special responsibility' of dominant firms, Executive Vice-President Vestager stated that *we need competition, to keep our markets working fairly for everyone. And companies that dominate their markets have a special responsibility to make sure that their actions don't harm competition. […] We don't want dominant companies to stop trying to compete. But that dominance gives them power to influence the market, in ways that can harm competition and consumers. Just by doing things that would be normal for less powerful companies, they can end up driving their rivals from the market – even when those rivals are offering products and prices that are just as good. And of course, when that happens, it's consumers who suffer. They lose out on the good things that competition brings. The lower prices, the wider choice, the more innovative products*. See the speech *A market that works for consumers*, delivered at the *Studienvereinigung Kartellrecht International EU Competition Law Forum*, Brussels, 12 March 2018, available at https://wayback.archive-it.org/12090/20191129214816/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/market-works-consumers_en (accessed 4 May 2021). About the special responsibility of dominant firms is worth underlining the ECJ's position in decision 9 November 1983, case 322/81, *N.V. Nederlandsche Banden-Industrie-Michelin v. Commission (Michelin)*, para 57, where it stated that a dominant company *has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market*. See also ECJ, *TeliaSonera*, cit., para 24. The 'special responsibility' of dominant firms is addressed also by A. Ezrachi, *EU Competition Law Goals and The Digital Economy*, cit., 8. The Ordoliberal matrix from the 'as if' principle to the 'special responsibility' of dominant firm is explained in C. Ahlborn and C. Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, cit., 208.

[422] N. Dunne, *Fairness and the Challenge of Making Markets Work Better*, The Modern Law Review, 2021, 84, 2, 262. On the debate about the role that fairness should play in competition law, see, *inter alia*, D. Gerard, A. Komnios and D. Waelbroeck (Eds.), *Fairness in EU Competition Policy: Significance and Implications. An Inquiry into the Soul and Spirit of Competition Enforcement in Europe*, Bruylant, 2020; A. Lamadrid de Pablo, *Competition Law as Fairness*, Journal of European Law & Practice, 2017, 8, 3, 147; R. Whish and D. Bailey, *Competition Law*, cit., 22-23; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 31-33; D.

Anyhow, we deem that this concept might not have a paramount practical influence in the day-by-day evaluation of the single cases, but it informs the whole system of EU competition law.[423] In particular, it lies at the foundation of the provisions regarding the fair share that competition rules shall attribute to consumers, and this *distribution needs to be "fair" by considering next to price other non-price-related benefits a consumer might receive in compensation for an increase in market power*.[424] A sign of this requirement is evident in the 'fair share' expression contained in article 101, paragraph 3, TFEU.[425] According to Ezrachi, the concept of fairness should not be used to protect competitors, but as an abstract normative value aimed at preserving the competitive process, thus consequently increasing trust in the market.[426] Indeed, it results from this wide interpretation of EU competition law that the final aim of the competitive process shall lead towards an

Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit.; E. Clutterbuck, *Competition policy and the issue of fairness*, European Competition Law Review, 2020, 41, 7, 323.

[423] In this sense former Director-General for Competition Johannes Laitenberger stated that fairness *is a way to express the overall goals and benefits of EU competition policy in a more tangible manner. It is not meant as a self-sufficient, generic legal test to be applied in cases. And certainly, the very concept of "fairness" excludes that it substitutes rigorous, fact-based analysis*. See J. Laitenberger, *Panel on "Fairness in Unilateral Practice Cases"*, speech delivered at the *GCLC Conference*, Brussels, 26 January 2018, available at https://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf (accessed 6 May 2021). See also A. Lamadrid de Pablo, *Competition Law as Fairness*, cit., 148. Here the Author also sustains that *connecting 'fairness' to competition law is therefore not a way to divorce the discipline from economics but to reconcile it with society, showing the wider public that it can contribute to their well-being*.

[424] D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 4. Although, contrarily, R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, 117-118 argues that the EU Treaties does not provide for a redistribution of wealth from producers to consumers. Moreover, according to the same Nazzini (pp. 144-150, 153) fairness is a test (which in practice coincides with the 'as efficient competitor' test) that must be interpreted according to what this Author recognises as the objective of article 102 TFEU, *i.e.* maximising long-term social welfare through productivity growth.

[425] An interesting analysis of the 'fair share' requirement as a distributive justice standard is provided by I. Lianos, V. Korah, P. Siciliani, *Competition Law*, cit., 105-107. Moreover, as pointed out by G. Monti, *EC Competition Law*, Cambridge University Press, 2007, 50, although article 101, paragraph 3, TFEU allows for a reduction of economic freedom, its complete elimination is not allowed. Indeed, without economic freedom consumers cannot benefit of the gains referred to in the concerned provision.

[426] A. Ezrachi, *EU Competition Law Goals and The Digital Economy*, cit., 13-14. Here it is also reported an interesting passage from former President of the European Commission Jean-Claude Juncker speech at the State of the Union, when he stated that *the Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for*. See *State of the Union 2016*, 14 September 2016, 11, available at https://op.europa.eu/en/publication-detail/-/publication/c9ff4ff6-9a81-11e6-9bca-01aa75ed71a1 (accessed 6 May 2021).

overall increase in the benefit of all the market players and of the European economy as a whole. This shall also be regarded in line with the abovementioned objective related to the development of the internal market.[427] This concept was already outlined in 1961 by the first Community Commissioner for competition, Hans von der Gröben, who affirmed that the Treaty *requires the establishment of a system which will provide a general assurance that competition in the Common Market will not be distorted*.[428]

The fact that EU competition law's primary concern is the maintenance of an open and healthy competitive internal market can be gathered also by the Court of Justice case law. In particular, the ECJ has always stressed how competition rules are aimed at protecting the process of competition. One of the main statements by the Court of Justice in favour of this approach was delivered in the *British Airways* judgement.[429] Here, the Luxembourg Judges, by making reference to the dated and mentioned *Continental Can* precedent,[430] affirmed that *Article 82 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC*.[431]

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[427] D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 6.

[428] Commissioner Hans von der Gröben, *Competition in the Common Market*, speech delivered during the debate on the draft regulation pursuant to Articles 85 and 86 of the EEC Treaty in the European Parliament, 1961, 5, available at http://aei.pitt.edu/14786/1/S49-50.pdf (accessed 5 May 2021). About the 'fair share' that competition shall provide, former Commissioner von der Gröben interestingly stated that *it is therefore a matter of maintaining, promoting and creating a competition that stimulates productivity and rewards the most efficient firms, consequently leading to a primary distribution of income and richness in line with such productivity. Only such a competition may create a sufficiently wide basis allowing a secondary distribution of income and richness in accordance with the principle of social justice. […] Competition is not only a tool of economic planning, but also a social policy factor* (translation by this book's Author), see Commissioner H. von der Gröben, *La politique de concurrence dans le marché commun*, 1965, available at http://aei.pitt.edu/13526/1/13526.pdf (accessed 5 May 2021).

[429] European Court of Justice, decision 15 March 2007, case C-95/04 P, *British Airways plc v. Commission*.

[430] ECJ, *Continental Can*, cit., para 26.

[431] ECJ, *British Airways*, cit., para 106. In this sense it is worth mentioning the statement at paragraph 68 of the opinion delivered on this case by Advocate General Kokott, who affirmed that *the provision [Article 82 EC] forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of the individual competitors or consumers, but to protect the* structure of the market *and thus* competition as such (as an institution), *which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as*

However, notwithstanding the *Continental Can* precedent and the Court of Justice's interpretation of competition rules' aim, the 'more economic approach' was then endorsed by the Court of First Instance in the *GlaxoSmithKline* decision, thus apparently granting it a place into the EU's judicial praxis.[432] Here the Court stressed that *the objective of the Community competition rules is to prevent undertakings, by restricting competition by themselves or with third parties, from reducing the welfare of the final consumer of the products in question*.[433] And, accordingly, that *the legitimacy of that transfer of wealth from the producer to intermediary is not of interest to competition law, which is concerned only with its impact on the welfare of the final consumer*.[434]

Anyhow, the Court of First Instance's approach was not upheld on appeal,[435] where the Court of Justice remained consistent with its precedents. The Court of Luxembourg here sustained that *with respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court [of Justice] notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position*.[436] *First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interest of competitors or consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that*

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such is damaged, disadvantages for consumers are also to be feared. See C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 244-246; C. Osti, *Ritorno al contenuto politico della concorrenza*, cit., 53-54; Sir P. Roth, *The continual evolution of competition law*, cit., 20-21; G. Monti, *EC Competition Law*, cit., 211-212; R. Nazzini, *The Foundations of European Union Competition Law*, cit., 138-139.

[432] EU General Court, decision 27 September 2006, case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*.

[433] *Ibidem*, para 171.

[434] *Ibidem*, para 273.

[435] ECJ, *GlaxoSmithKline*, cit.

[436] *Ibidem*, para 62.

final consumers be deprived of the advantages of effective competition in terms of supply or price.[437] The same conclusion was however reached by the ECJ some months before, while ruling on the *T-Mobile* case,[438] where it was affirmed that EU competition rules are *designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such*.[439]

It is worth highlighting that, in the context of abuse of dominance, already back in 1979, the Court of Justice, in the *Hoffmann-La Roche* decision,[440] stated that *the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*.[441]

However, an optimal position between the more economic approach and the protection of competition as such approach has been found recently by the Court of Justice, through the 'as efficient competitor' argument, also in line with the Commission Guidance on the application of article 102 TFEU.[442] In this Communication, the Commission points out that in the context of exclusionary conducts it would normally intervene only when the allegedly anticompetitive conduct is likely to impact on competition from competitors which are 'as efficient

[437] *Ibidem*, para 63.
[438] European Court of Justice, decision 4 June 2009, case C-8/08, *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*.
[439] *Ibidem*, para 38. See also the opinion delivered by Advocate General Kokott on the same case, para 58.
[440] European Court of Justice, decision 13 February 1979, case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*.
[441] *Ibidem*, para 91.
[442] Although Court of Justice, decision 6 October 2015, case C-23/14, *Post Danmark A/S v. Konkurrencerådet (Post Danmark II)*, para 52, expressly affirmed that *the administrative practice followed by the Commission is not binding on national competition authorities and courts*. Anyway, the same ECJ appeared to follow the Guidance's approach. See G. Monti, *Article 102: sources of interpretation*, in P.L. Parcu, G. Monti, M. Botta (Eds.), *Abuse of Dominance in EU Competition Law. Emerging Trends*, Edward Elgar, 2017, 39.

as' the dominant firm.[443] Anyhow, the Guidelines also precise that in particular circumstances the Commission can take into account also the position of a less efficient competitor, which, without the anticompetitive conduct, may well improve its efficiency level through, *e.g.* network and learning effects.[444] Moreover, the same Guidelines appear to interpret benefit to consumers as a positive by-product of a healthy competitive process. In fact, it is stated that *vigorous price competition is generally beneficial to consumers*.[445]

The 'as efficient competitor' was then gradually endorsed by the Court of Justice[446] in decisions such as *TeliaSonera*,[447] *Post Danmark I*[448] and *Post Danmark II*[449] and *Intel*.[450] In particular, the Court of Justice's *Post Danmark I* decision held that a dominant firm cannot undertake practices having *an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits*.[451] However, as well clarified by the Court in *Post Danmark I*,[452] this requirement cannot be interpreted as a hidden goal of protecting inefficient competitors, but only as a test intended to understand if the concerned practice is able to distort the competitive process. As a matter of fact, the elimination of less efficient competitors from the market has to be regarded as a result of rivalry and competition on the merits.[453] However, a clarification regarding the 'as efficient competitor' that could prove helpful in the current digital market context has regard to firms having less resources to compete than the dominant one. This clarification

[443] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, cit., point 23.
[444] *Ibidem*, point 24.
[445] *Ibidem*, point 23.
[446] P. Ibáñez Colomo, *The Shaping of EU Competition Law*, Cambridge University Press, 2018, 176, 195.
[447] ECJ, *TeliaSonera*, cit., para 64.
[448] European Court of Justice, decision 27 March 2012, case C-209/10, *Post Danmark S/A v. Konkurrencerådet (Post Danmark I)*, para 25.
[449] ECJ, *Post Danmark II*, cit., para 66.
[450] ECJ, *Intel*, cit., paras 136, 139-140.
[451] ECJ, *Post Danmark I*, cit., para 25.
[452] ECJ, *Post Danmark I*, cit., para 22.
[453] P. Ibáñez Colomo, *The Shaping of EU Competition Law*, cit., 187; P. Ibáñez Colomo, *Why Article 102 TFEU is about equally efficient rivals: legal certainty, causality and competition on the merits*, Chillin'Competition, 10 May 2021, available at https://chillingcompetition.com/2021/05/10/why-article-102-tfeu-is-about-equally-efficient-rivals-legal-certainty-causality-and-competition-on-the-merits/ (accessed 10 May 2021).

– consistent also with the article 102 Guidance from the Commission reported above – dates back to the Court of Justice's *AKZO* ruling,[454] where it was affirmed that predatory pricing schemes were deemed unlawful if they *can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them*.[455]

More stance to economic reasoning was recently recognised by the Luxembourg Court in *Intel*,[456] where it was stated that efficiency advantages may counterbalance a disadvantage for competition, but only if they benefit the consumer.[457] Here, however, the ECJ makes explicit reference to the *British Airways* judgement, thus implying a certain degree of consistency with the latter decision and not a complete endorsement of a pure efficiency-driven consumer welfare standard. Indeed, despite the more efficiency-oriented approach by the ECJ in *Intel*, it has been sustained that *positive law still supports the view that EU competition law pursues multiple goals*.[458]

The analysis above confirms how the protection of competition as such is central in the EU competition law discourse and how recent tendencies more focused on efficiency cannot replace this very foundation of the European competition law system. However, as brilliantly suggested by Professor Giorgio Monti, although the developments in economics, such as the 'as efficient competitor test', cannot reshape competition law enforcement in the EU, they can refine the analysis carried out by competition Authorities and Courts, in order to find a point of equilibrium between economic analysis and the original goals of EU competition law.[459] This approach fits perfectly into the *metriotes* concept suggested before, where economics is a necessary tool for a correct application of competition rules, but not more. Indeed, these rules shall not be subordinate to concepts like efficiency, but

[454] European Court of Justice, decision 3 July 1991, case C-62/86, *AKZO Chemie BV v. Commission*.
[455] *Ibidem*, para 72.
[456] European Court of Justice, decision 6 September 2017, case C-413/14 P, *Intel Corporation Inc. v. Commission*.
[457] *Ibidem*, para 140.
[458] I. Lianos, V. Korah, P. Siciliani, *Competition Law*, cit., 120.
[459] G. Monti, *Article 102: sources of interpretation*, cit., 44-45, 50. Indeed, according to the same Author, in G. Monti, *EC Competition Law*, cit., 212, *the economic freedom roots [of EU competition law] are too strong to give away to a full economic analysis*.

they shall act in light of the guiding principles provided for by the EU Treaties and also by the member States' Constitutional traditions.

Finally, it is interesting to mention that the focus on the competitive process' protection and on the 'fair share' of the benefits provided by the market appears to be rooted in the Ordoliberal tradition, which deserves a close look in the following paragraph.[460] In particular, the Ordoliberal thinking shall be seen as a heritage that EU competition law need to valorise in a time of changes and new challenges, like – with respect to U.S. antitrust law – the Brandeisian thought analysed in the end of chapter 3.

7. The Ordoliberal tradition: a precious inheritance for EU competition law

The Ordoliberal school, or Freiburg school, from the city where its most prominent adherents met, can be regarded – for certain aspects – as a theoretical basis for EU competition law, with particular reference to the focus on competition as an institution. The most well-known figures associated with this school are Walter Eucken, Franz Böhm, Hans Grossmann-Doerth. At certain extent, also Wilhem Röpke's position could be included into this school thought, together with the former President of the Italian Republic Luigi Einaudi.[461] The founders of the school convened in Freiburg during the Nazi period and Freiburg's liberal tradition,

[460] With regard to article 102 TFEU, the objective of protecting competition as such has been stressed effectively by the Ordoliberal lawyer Ernst-Joachim Mestmäcker, who, as reported by Heike Schweitzer, sustained that *competition law does not merely protect a certain degree of market efficiency, but it protects individual liberties against types of conduct that endanger competition if generalized. The protection of individual liberties is, at the same time, closely linked to the protection of competition as an institution, and to competition law's economic rationale: Article 82 must, in the medium and long term, protect the possibility that positions of dominance will be corrected by the market. This presupposes the protection of those elements of competition that still persist.* This passage is reported by H. Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in C. Ehlermann and M. Marquis, *European Competition Law Annual 2007*, Hart Publishing, 2008, 140, while reading E. Mestmäcker, *Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des EWG-Vertrags*, in E. Mastmäcker, *Wirtschaft und Verfassung in der Europäischen Union*, Nomos, 2006, 607-608. See also C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 242.

[461] D.J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, The American Journal of Comparative Law, 1994, 42, 1, 31-32.

as well with its geographical 'isolation', made it possible to freely develop the school's theories.[462]

The starting point to understand the Ordoliberal thought might be considered the end of the Weimar Republic and the subsequent establishment of the Nazi regime. In particular, Ordoliberals perceived the Weimar Republic's weakness as one of the principal reasons that caused the Nazi's advent. In fact, in their view the Weimar government proved politically feeble in relation to private power exercised by big industrial conglomerates.[463] This premise is essential to understand the seminal belief that Ordoliberals posed on competition and on the role of a 'strong state' in maintaining this competitive process operative in the market.[464] In particular, they were concerned, in Böhm's words, by *the issue of private power in a free society.*[465]

Ordoliberals sought to find a sort of medium between the dirigiste State intervention in the economy and the excessive *laissez-faire* experienced by the western world from the end of XIX Century and the time when they were writing.[466] In particular, they perceived an excessively unregulated economy as a threat to individuals and small firms' freedom. In this sense, they sustained that the excessive economic power consequential to a complete *laissez-faire* system could turn into political power, thus guiding – *i.e.*, 'capturing' – the legislator's action in the interest of such economic power groups only. This could then lead to a separation between the

[462] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 235.
[463] *Ibidem*. See also L. Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, European Competition Journal, 2007, 3, 2, 332.
[464] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 249-250. See also W. Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, New Political Economy, 2012, 17, 5, 633.
[465] F. Böhm, *Die Forschungs und Lehrgemeinschaft zwischen Juristen und Volkswirten an der Universität Freiburg in den dreissiger und vierziger Jahren des 20. Jahrhunderts*, in E. Mestmäcker (Ed.), *Franz Böhm – Reden und Schriften*, CF Müller, 1960, 162, quoted by D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 235. See also D.J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, cit., 29-30.
[466] D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 3; D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 239; C. Ahlborn and C. Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, Competition Policy International, 2006, 2, 2, 198, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1585797_code454734.pdf?abstractid=1585797&mirid=1 (accessed 6 May 2021); H. Rieter and M. Schmolz, *The ideas of German Ordoliberalism 1938-45: pointing the way to a new economic order*, The European Journal of the History of Economic Thought, 1993, 1, 1, 100. In this sense G. Monti, *EC Competition Law*, cit., 24, underlines that Ordoliberals' ideas are incompatible with a Kaldor-Hicks conception of economic efficiency.

State's action and the citizens' needs, thus diminishing their trust in the government.

Consequently, Ordoliberals suggested a system where social values, such as social security and social justice, are at the centre of the political discourse, aimed at making citizens feeling integrated into a democratic society.[467] However, in order to achieve this goal, the market shall play the fundamental goal of providing *equal opportunities for participation to all*.[468] Therefore, excessive market power needs to be constrained and limited and the tool needed in this sense is represented by competition. According to the Ordoliberals' thought, only a market founded on a sort of 'complete competition' might have delivered the result of a fair and inclusive society.[469] In adhesion to this view, they were contrary to the formation of monopolies, and they sought an economic system formed by small and medium firms. It is evident how this point of the Ordoliberals' view is similar to the Brandeisian thought described in the end of chapter 3. This parallelism may also be helpful in finding some common element between the U.S. antitrust tradition and the EU framework, especially in order to achieve a common position on the objectives to pursue and the tools needed to better understand and face the issue of tech monopolies or oligopolies that we will examine in chapter 5 of the present work.

Anyhow, returning on the Ordoliberal school, as anticipated, their thinkers sustained the necessity of a strong State to achieve their political and economic scheme. In particular, a weak State cannot be capable of constraining strong economic power, which then – as mentioned – could turn into political influence and capture of the same weak State's institutions devoted at maintaining the

[467] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 241. See, in particular, the quotation from W. Eucken, *Grundsätze der Wirtschaftspolitik*, Mohr Siebeck, 1990, 1, who stated that *social security and social justice are the greatest concerns of our time*. See also L. Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, cit., 333-334.
[468] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 241.
[469] C. Ahlborn and C. Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, cit., 200; H. Rieter and M. Schmolz, *The ideas of German Ordoliberalism 1938-45: pointing the way to a new economic order*, cit., 100.

democratic and inclusive system the Ordoliberals believed in.[470] Contrarywise, of course, a strong State can be firm in respecting its purposes and maintaining a healthy democratic system and an inclusive economic environment, which can grant its citizens a sort of equality of opportunities.[471]

Together with an institutionally strong State and as a basis of this strength shall act competition. In the Ordoliberals' thought, the value of competition shall be included into what can be called the 'economic constitution'. According to the Ordoliberals, the economic environment shall be shaped upon the policy values and choices included into the constitution.[472] In particular, constitutional provisions shall be aimed at maintaining the social and economic order (the '*Ordnung*' concept elaborated by Eucken) designed by the State, in line with the so-called *Ordnungspolitik*.[473] According to this concept, any direct intervention of the State into the economy ought to be avoided, but the government shall design the rules of this economic system and then it must enforce them, thus granting that the players behave fairly, according to the indirect regulation scheme.[474]

Finally, according to Ordoliberals, competition must play an essential role in this 'order'. In fact, the process of competition is the instrument that allow the dispersion of private economic power and thus the maintenance of the system envisioned by the Freiburg thinkers. In this sense, they sought to protect the 'institution' of competition, *i.e.* competition as such,[475] a concept we have found applied above, in particular in Advocate General Kokott's opinion for the *British Airways* case.[476] The Ordoliberals' view on this point sustained the destruction of

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[470] L. Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, cit., 332-333.
[471] See also R. Nazzini, *The Foundations of European Union Competition Law*, cit., 145, footnote 171, according to whom (quoting F. Böhm) *for the ordoliberals, competition was necessary not only for the market performance but also to protect fairness and equality of opportunities on the market*. This notion is also close to the 'equality of starting points' concept elaborated by Luigi Einaudi, see L. Einaudi, *Lezioni di politica sociale*, Einaudi, 1949, 169-246.
[472] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 245.
[473] *Ibidem*, 246, 255-256; C. Ahlborn and C. Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, cit., 202-203.
[474] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 248.
[475] *Ibidem*, 250-251; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 27-28.
[476] L. Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, cit., 337.

monopolies which could exercise an excessive economic power, thus breaking the 'order'. At this scope, structural remedies, such as these firms' break-up, were suggested.[477] Another interesting concept elaborated by the Ordoliberals was the so-called *as if standard*, according to which a firm holding a dominant position shall behave *as if* it faces competition, which means *as if* it does not hold a dominant position and must compete with other firms.[478] This is very close to the 'as efficient competitor' test analysed above.

We have mentioned before that the influence of Ordoliberal ideas on the establishment EU competition law is debated, although the prohibition contained in article 102 TFEU seems to have an Ordoliberal matrix.[479] However, what can be sustained with certainty is that they have played a role in its development, as seen with reference to the approach regarding the protection of the competitive process as such or in the broader social objectives that competition law shall help pursuing in the Union.[480] In fact, in the words of former Commissioner von der Gröben, *a system of competition with a clear legal framework has also a great political, sociological and legal advantage: it ensures the maximum personal liberty to all who compete in the market. Competition means freedom of choice for producers, dealers and consumers. Competition policy must preserve that liberty and see to it that economic freedom is not abused to prevent others from enjoying the same freedom. Freedom of contract must not be used to curtail freedom of competition, and freedom of competition must not be abused to curtail fairness and good faith in competition*.[481] This link between freedom and a competitive market clearly reminds to the concepts expressed by the Ordoliberals and, again – as we suggested above – to the first American approach to antitrust,[482] together with the Brandeisian one. Moreover, it shall be highlighted how competition law's social role, as described by von der Gröben, is a main feature of the 'social market economy' concept transplanted also in the EU through the abovementioned article 3,

[477] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 251-252.
[478] *Ibidem*, 252-253. See also D.J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, cit., 52-53.
[479] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 264.
[480] C. Osti, *Antitrust: a Heimlich manoeuvre*, cit., 239-240.
[481] Commissioner H. von der Gröben, *Competition in the Common Market*, cit., 8-9.
[482] G. Monti, *EC Competition Law*, cit., 24.

paragraph 3, TEU. This expression, coined by Alfred Müller-Armack in 1946,[483] played indeed a central role in Ludwig Erhard's politics when he was first Germany's economics minister and then Chancellor.[484] The social market economy doctrine is closely related to Ordoliberalism, although more focused on the 'fair share' that the society shall obtain from the market activity.[485] In this sense, the concept of social market economy returns and better clarifies what we have described above about the role that EU competition law should play in the society. In a nutshell, it shall promote competition among firms and innovation, but in an *Ordnung* devoted at maintaining citizens' economic and political freedom and devoted at providing citizens and consumers – as pointed out by Commission's Executive Vice-President Vestager – *the lower prices, the wider choice, the more innovative products*.[486] In this sense, as brilliantly formulated by Hildebrand, the social market economy provision contained in the TEU *defines the frame within the EU competition law provisions should operate*.[487] Consequently, the values that lie at the foundations of the EU shall guide the reform and the enforcement of competition law, in order to achieve, together with other disciplines, an economic and social environment ever more compliant with the Treaties' values, as required also by the 'consistency clause' set forth by Article 7 TFEU. In this sense, according to the EU Commission, *competition policy cannot therefore be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context*.[488]

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[483] Although some uncertainty about the origin of this espression permains. On the 'social market economy' concept see A. Müller-Armack, *Wirtschaftslenkung und Marktwirtsschaft*, Kastell, 1990; C.L. Glossner and D. Gregosz, *The Formation and Implementation of the Social Market Economy by Alfred Müller-Armack and Ludwig Erhard*, Konrad Adenauer Stiftung, 2011, available at https://www.kas.de/c/document_library/get_file?uuid=43f08a1b-2eeb-728c-6d6d-8740bda786fd&groupId=252038 (accessed 25 September 2021).

[484] D.J. Gerber, *Law and Competition in Twentieth Century Europe*, cit., 236-237.

[485] *Ibidem*, and 270-276 about the foundations of German competition law. See also D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 3.

[486] EU Commission's Executive Vice-President Margrethe Vestager, *A market that works for consumers*, cit.

[487] D. Hildebrand, *The equality and social fairness objectives in EU competition law: The European school of thought*, cit., 3.

[488] EU Commission, *XXIInd Report on Competition Policy 1992*, 1993, 13.

8. Conclusion

The present chapter analysed the evolution of EU competition law since its establishment until the present days. What emerges is that, during its development phase, EU competition law was based on a panoply of different goals and how many of them are endowed with a *complementary and interdependent nature*.[489] Moreover, the focus among the various goals have shifted among the different phases of EU competition law's evolution because, as well pointed out both by Whish and Bailey and Ezrachi, such rules are not isolated, but they are part of the social and political context in which they are adopted and enforced.[490]

The review carried out in this chapter proves also useful to establish a link with the U.S. antitrust discipline scrutinised in chapter 3, aimed at identifying the fundamental lines along which a modernisation of competition law shall be carried out. Indeed, the Ordoliberals' heritage appears to share some mutual background values with the Brandeisian thought described in the previous chapter. Our view is that these conceptions shall be introduced into the competition law's reform discussion. Of course, this shall be made critically, and the positive innovations brought by the Chicago school and thanks to the EU's 'more economic approach' shall be retained. Anyhow, an effort appears needed in order to make competition law more socially accountable and more attentive to the needs of society.[491] With a certain Ordoliberal flavour, competition law – together with other policies – shall be reformed and intended in a manner that can contribute to the creation of an *Ordnung* aimed at protecting and empowering the European social market economy and all the EU's values.

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[489] A. Ezrachi, *EU Competition Law Goals and The Digital Economy*, Oxford Legal Studies Research Paper No. 17/2018, 2018, 3, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3222929_code437389.pdf?abstractid=3191766&mirid=1 (accessed 5 May 2021). The Author effectively summarises these goals in the chart reported at p. 4, where the following objectives are reported: Consumer welfare, effective competition structure, efficiency and innovation, market integration, consumer well-being, fairness, plurality and economic freedom. The Author then analyses all these goals from at pp. 4-21. See also A. Ezrachi, *Sponge*, cit., 52.

[490] R. Whish and D. Bailey, *Competition Law*, cit., 19; A. Ezrachi, *Sponge*, cit., 51-52.

[491] It is worth mentioning that Social Rights have become European Pillar during the 2017 Gothenburg Summit. More information on the European Pillar of Social Rights are available at https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en (accessed 6 May 2021).

Finally, we have not to ignore the fact that a discussion about the role of competition law is at stake in both the Atlantic's sides. Identifying commonalities between the fundamental values of both US antitrust law and EU competition law would be particularly helpful in finding convergent policy options between the two main competition law systems, which are now called to deal with the digital economy, which has – by definition – a global dimension.[492] From a comparative law's perspective, this effort is particularly challenging, but the knowledge of common affinities and differences among the two systems may prove beneficial in order to understand which are the best solutions, without risking a rejection effect.[493]

[492] The need for a cross-border dialogue for launching a new, fairness-based, era of antitrust emerged also by the European University Institute's Florence Competition Programme Fourth Annual Conference, *Hipster Antitrust, the European Way?*, held on 25 October 2019. See the relevant policy brief by M. Botta and S. Solidoro, *Hipster Antitrust, the European Way?*, cit., 3.

[493] See, again, A. Ezrachi, *Sponge*, cit., 71-75, who highlights the peculiarities of each national competition law system and the inconsistencies and frictions that mere transplants of rules and principles may cause. Possible solutions for international convergence on competition rules were laid down by E.M. Fox, *Toward World Antitrust and Market Access*, The American Journal of International Law, 1997, 91, 1, 1 ff. However, also from a comparative law standpoint, we suggest the cautious approach expressed in the abovementioned work by Ezrachi.

5

Competition law and the challenge of digitalisation

[T]he disadvantages of size outweigh in many respects the advantages of size; but there is one respect in which the great industry has an important advantage. That is in the collection, the getting of knowledge, the collection of data in regard to trade, that knowledge for which great concerns extend their bases of inquiry all over the world.[494]

The current social and economic scenario is dominated by the pervasive presence of big tech corporations, also called, with a negative flavour, *tech giants*. As we already pointed out, data show a general increase in concentration around all markets, but this is particularly evident in digital markets. If we focus the attention on the competition law discourse, the issue raised by these companies is that of an excessive market power, leading to dynamics that the current competition law's toolbox and theories are not well equipped to challenge. As we have outlined in chapter 1, this research aims to advance an approach to competition law that is not

[494] Justice L.D. Brandeis, *The Democracy of Business*, in O.K. Fraenkel (Ed.) *The Curse of Bigness. Miscellaneous papers of Louis D. Brandeis*, Viking Press, 1934, 140, quoted in J. Rosen, *Louis D. Brandeis: American Prophet*, Yale University Press, 2016, 65.

only focused on economic efficiency and merely economic goals, but which is 'sustainable', in the sense that it is grounded on multiple values, which, precisely, are the values upon which our societies are built. In this chapter we will focus our research on the possibility to reach a workable system of rules aimed at tackling tech giants' excessive market power, and we will apply the mentioned 'multi-value' approach to our analysis.

For the sake of introducing this chapter's reasoning, the assumption upon which it is necessary to build the whole discourse is that, being present a market power problem, competition law shall play a role in this context. Therefore, and based on this assumption, it is necessary to investigate what role competition provisions shall perform, and if they need to be complemented by a sort of 'multi-tool arsenal', composed also by regulation, consumer law and data protection rules.

For this purpose, the present chapter will first analyse why the current competition law understanding is put under pressure by the tech giants. In order perform this task, the business strategies and the market behaviours of the most important tech giants will be scrutinised, together with the concerns they raise and the solutions adopted – under the current regulatory framework – by Competition Authorities and Courts. Then, we will answer this chapter's research question by prospecting the possible normative and interpretative innovations that might be introduced in order to understand whether a sustainable approach to competition law can solve the market power problems characterising digital markets.

PART I – THE SCRUTTURE OF DIGITAL MARKETS AND THE CONSEQUENT MARKET POWER ISSUE

1. Tech giants: A closer look to strategies, market dynamics and issues raised

The advent of digitalisation and the innovative services brought to us by digital companies shall be regarded overall as a positive feature of our economies.[495] Indeed, they have generated a plethora of benefits for users, and this appears a positive outcome of the efficient business strategies that these companies have adopted. In fact, it is out of question that users are now benefitting of valuable services for a price which is nominal or equal to zero.[496] So described, we might believe that we are living in a reality where the consumers are in a pivotal position, and everything is running around them and for their needs. However, *free cheese is only in the mousetrap* and this impression may prove illusory.

Given this premise, the first question that ought to be raised is: Why if tech companies act like a sort of charities (*i.e.* offering valuable product for free or for a nominal price) their profits and market shares are impressively increasing? We know that this question appears quite 'populist', but we deem that this is the right starting point to introduce an analysis of tech giants' business behaviour.

If we move to mere data, in 2020 Amazon set a record, by increasing its 2019 revenues of more than 100 billion dollars. Indeed, in 2020 Amazon increased its revenues of 38% to 386 billion dollars. Its net profits were up 84% if compared to the previous year.[497] In a similar vein, in Q4 of 2020 Facebook revenues grew to 28 billion dollars, up 33% in respect of the same term one year before, and its profits

[495] A. Ezrachi and M.E. Stucke, *Virtual Competition*, Harvard University Press, 2016, VII. See also J.B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law*, Journal of Competition Law & Economics, 00(00), 2.

[496] For the sake of exemplifying, we can now send emails for free by using good services such as Gmail or Outlook, we can send messages – including multimedia contents such as photos, videos, or voice registrations – for free and without limits (which, instead, characterised SMS or MMS). Moreover, and this has been particularly visible during the Covid-19 pandemic outbreak, we are able to meet people virtually, delivering classes online, making exams on video conferencing platforms and holding meetings from our homes, all for free or, in case of the so-called 'premium' subscriptions, for a nominal price. This 'virtual' environment can also have a plethora of positive side-effects, such as saving the commuting time and the consequential pollution or traffic, with benefits to, for instance, our amount of free time, productivity time and, finally, to the environment. Moreover, we are able to watch an infinite choice of movies or TV series simply from our tablet and for a very low price, if we take into account that the price for a month Netflix subscription is equal to the price of a single DVD. Furthermore, we have the opportunity, by paying a nominal 36 euro (in Italy) annual fee, of having free fast delivery by Amazon, together with all the entertainment of Amazon Prime Video and, in certain areas, to have our necessary food and home shopping delivered in a couple of hours in front of our door.

[497] S.E. Kohan, *Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion*, Forbes, 2 February 2021, available at https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=1956ec2c1334 (accessed 30 May 2021).

amounted to 11.2 billion dollars, increasing of 53%.[498] In 2020 Facebook totalised a revenue around 86 billion dollars, a datum that, from 2007 to 2020 experienced a continuous increase, especially during the last five years.[499] More interestingly, it is remarkable to note the amount of revenues earned by Facebook from advertising. If we take into account data from 2009 to 2020, we can notice a steady but significative increase, from 764 million dollars of ad revenues in 2009 to 84.169 million dollars in 2020, considering that advertising is Facebook's major source of revenues.[500] It is also impressing to notice that around 2.5 billion people use Facebook or its family apps on a daily basis.[501] The portrait does not change if we take into consideration Google. Indeed, 'Big G' accounted for annual revenues around 182 billion dollars in 2020, with a steady increase during the last five years (in 2016, for instance, it reported around 90 billion dollars of revenues).[502] As observed with regard to Facebook, the majority of these astonishing financial results comes from advertising: In 2020 Google accounted for around 147 billion dollars in advertising, registering a both steady and dramatic increase during the last years (in 2014, for instance, Google's advertising revenues were around 60 billion dollars).[503]

From the picture above, two significant considerations may be drawn. First of all, despite the economic crisis caused by the coronavirus pandemic, big tech registered

[498] M. Isaac, *Facebook posts a 33 percent increase in revenue and a 53 percent jump in profit*, The New York Times, 27 January 2021, available at https://www.nytimes.com/2021/01/27/business/facebook-earnings.html (accessed 30 May 2021).

[499] Facebook's revenue and net income from 2007 to 2020, available at https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/ (accessed 30 May 2021).

[500] Facebook's advertising revenue worldwide from 2009 to 2020, available at https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/ (accessed 30 May 2021).

[501] *Big Tech Earnings Surge as Economy Slumps*, The New York Times, available at https://www.nytimes.com/live/2020/07/30/business/stock-market-today-coronavirus (accessed 30 May 2021). See also (with reference to Facebook only) Number of daily active Facebook users worldwide as of 1st quarter 2021, available at https://www.statista.com/statistics/346167/facebook-global-dau/ (accessed 30 May 2021) and Number of monthly active Facebook users worldwide as of 1st quarter 2021, available at https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (accessed 30 May 2021).

[502] Annual revenue of Google from 2002 to 2020, available at https://www.statista.com/statistics/266206/googles-annual-global-revenue/ (accessed 30 May 2021).

[503] Advertising revenue of Google from 2001 to 2020, available at https://www.statista.com/statistics/266249/advertising-revenue-of-google/ (accessed 30 May 2021).

strong performances. In this context, it is interesting to report that since March 2020 big techs' market cap grew around 50 percent, whilst the Dow Jones Industrial Average registered a 5 percent growth (it is much more significant that this index includes Apple, which gave a significant contribution in the reported increase).[504]

The second assumption is, with particular regard to Facebook and Google, that these companies' business model heavily relies on advertisement and the fuel of this structure is, not surprisingly, *big data*.[505] In a nutshell, while we spend our time on the internet, by researching items on Google or by scrolling our Facebook or Instagram (a Facebook-owned firm) homepage, data about our behaviour is gathered and sold to advertisers, which, thanks to this set of information, can better tailor personalised advertising.[506] Moreover, such companies hold additional services that can track us also outside the main platform or search engine. It is sufficient to simply consider that Google can gather information by means of Gmail conversations, by the Google Chrome web browsing activity and, moreover, by almost everything that is done on Android smartphones, tablets and smartwatches.[507] And what about personal assistants, such as Amazon Alexa or Google Nest? They can, *inter alia*, hear conversations (as well as our smartphones and smartwatches do[508]), suggest buying something, indicate, among a plethora of

[504] R. Molla, *As Covid-19 surges, the world's biggest tech companies report staggering profits*, Vox, 30 October 2020, available at https://www.vox.com/recode/2020/10/30/21541699/big-tech-google-facebook-amazon-apple-coronavirus-profits (accessed 30 May 2021).

[505] Data are referred as a competitive input or a core economic asset. See M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 41.

[506] A. Ezrachi and V.H.S.E. Robertson, *Competition, Market Power and Third-Party Tracking*, World Competition, 2019, 42, 1, 7; J.M. Balkin, *Fixing Social Media's Grand Bargain*, cit., 2. It is not surprising, indeed, that if we are surfing, for instance, Samsung and Apple's websites in search of a new smartphone, in the next times we will find our webpages banners or our Instagram and Facebook's homepages full of smartphones advertisements.

[507] They can know where we are used going out eating, where and when we practice sport and which kind of activity we perform (It is not a case that when we visit a mall, restaurant or café, then these places magically appear in our Google Maps chart. In addition, Google Maps is so kind to suggest us places which are in line with our 'tastes', as silently understood through our past online and offline activities). Metaphorically, big techs are a shadow which always follow us: As a matter of fact, our smartwatches knows when we are sleeping and when we are awake, our ECG recordings, our blood pressure, our stress levels.

[508] It is interesting to note that, although in a proceeding regarding the Fourth Amendment to the U.S. Constitution and not our competition issues, the U.S. Supreme Court recognised the high degree of personal information contained in a smartphone. See U.S. Supreme Court, decision 25 June 2014, *Riley v. California*, 134 S Ct 2473 (2014). The Court, at B.1, held that people *who own a cell phone keep on their person a digital record of nearly every aspect of their lives – from the mundane to the intimate*. See also M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 33-34.

products, which one to purchase.[509] All that described, one can argue that all these services – although having an Orwellian taste – have been implemented in order to benefit us. And, at a certain extent, this is true, because we can take advantage of a myriad of services at a very low price, if any.

However, given the above, it is necessary to reflect about the relationship between tech giants, the services provided, and people. In other words, who benefits most from these technologies and why, apparently, they are so beneficial to citizens. In case one think that we are at the centre of this relationship, s/he may prove very disappointed after having reached the end of the present chapter. Indeed, as well expressed by Ezrachi and Stucke, although we think that tech giants are working for us, in reality we are working for them.[510] We are attracted to surf websites, scroll webpages for products or contents or watching videos, and in the meantime data about our behaviours and biases are collected, examined and in return we will receive content and advertisements always more refined on our profile and ever more in line with our tastes.[511] This in order to keep us attracted, gain more and more data, process them and sell them in what Shoshana Zuboff called 'Surveillance Capitalism',[512] dominated by companies which Tim Wu, in a sort of complementarity of term with Zuboff's work, named 'The attention merchants'.[513] Accordingly, Ezrachi and Stucke named big tech firms as 'gamemakers', because, in the telling metaphor elaborated by the Authors, they manage the game in which

[509] A. Ezrachi and M.E. Stucke, *Virtual Competition*, cit., 193-197; A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 106; A. Ezrachi and M.E. Stucke, *Is Your Digital Assistant Devious?*, University of Tennessee College of Law Research Paper no. 304, September 2016, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2828117_code258113.pdf?abstractid=2828117&mirid=1 (accessed 30 May 2021).
[510] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 200.
[511] J.M. Balkin, *Fixing Social Media's Grand Bargain*, cit., 2.
[512] S. Zuboff, *The Age of Surveillance Capitalism: The Fight fot a Human Future at the New Frontier of Power*, Public Affairs, 2019.
[513] T. Wu, *The Attention Merchants. How Big Business Lured Us In and Sold Us Out*, Atlantic Books, 2017; T. Wu, *Blind Spot: The Attention Economy and the Law*, Antitrust Law Journal, 2019, 82, 771. See also the considerations expressed by the Italian Autorità per le Garanzie nelle Comunicazioni in the report by AGCM and Others, *Indagine conoscitiva sui big data*, cit., 32. Here the Italian Communication Authority noted that *the very high value of these information in order to configure specific consumption habits profile encourages online platforms to gather as much attention as possible, also through the promotion and the proposal of contents that the user likes. The dataset gathered in this way is further monetised by selling it to third parties, in some cases in violation of data protection provisions, while in other cases through the use of such data beyond the consent granted by the user and in violation of fundamental rights and freedoms* (free translation by the Author).

we are part.[514] In their analysis, the two eminent Scholars suggest that the 'gamemakers' adopt methods capable of exploiting our behavioural biases in order to keep us behind our smartphones or PCs' screens. For instance, they reported how all the changes in design or functionalities that occur on Facebook are properly designed to better exploit users.[515] Moreover, the social network studies humans' biases in order to keep users attracted from its product. Here reference is made, for instance, to the 'fear of missing out' or 'FOMO', which is the mental status of people who fear that others are enjoying pleasurable experiences from which they are excluded, which leads to the consequence of continuously scrolling Facebook or Instagram homepages in order to be up to date about what other people are doing.[516] Meanwhile, between one post or photography and another, personalised ads are inserted, and Facebook gains. If we consider that on average a person in 2018 spent fifty-three minutes a day on Instagram and fifty-eight on Facebook, the portrait is almost complete.[517] As Ezrachi and Stucke noted, indeed, *this is how we end up working for the Gamemakers – for free: by posting content and commenting on other people's posts, which in turn supports Facebook's advertisers*.[518] Not casually, the same Facebook's COO Sheryl Sandberg sustained in front of the Company's investors that the social network is the best place for advertisers to show ads which will capture users' attention.[519] In this scenario, as suggested by Mark

[514] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 192. The report by the EU Commission, *Competition policy for the digital era*, cit., 60-70, states that, having regard to competition on the platform, platforms act *as regulators*. See also V.D. Roman, *Platform-to-Business Regulation – Where Does it Fit in the EU Antitrust Constellation?*, Journal of European Competition Law & Practice, 2021, 12, 1, 15.
[515] *Ibidem*, 199.
[516] *Ibidem*, 199-200.
[517] R. Molla and K. Wagner, *People spend almost as much time on Instagram as they do on Facebook*, Vox, 25 June 2018, available at https://www.vox.com/2018/6/25/17501224/instagram-facebook-snapchat-time-spent-growth-data (accessed 30 May 2021). See also the graph on Statista, Daily time spent on social networking by internet users worldwide from 2012 to 2020, available at https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/ (accessed 30 May 2021). According to the data showed, the amount of time spent on social networks steadily increased during the analysed timeframe and reached a *plateau* of 145 minutes per day spent in 2019 and 2020.
[518] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 200.
[519] *Ibidem*. See Facebook, Inc., *Third Quarter 2018 Results Conference Call*, 30 October 2018, 6, available at https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q3/Q318-earnings-call-transcript.pdf (accessed 30 May 2021). On Facebook's business model see also M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 38. The Authors, at p. 54 also report that innovations in privacy are regarded by Facebook as a threat to its business model.

Zuckerberg's early mentor Roger McNamee, it is evident that are *humans who are in service to technology*.[520]

A quite different discourse shall be made with respect to Amazon. First, according to the report issued in the end of 2020 by the U.S. Congress Subcommittee on Antitrust, Amazon hold *about 50% or higher* of U.S. online retail sales,[521] a datum that can provide a first portrait of this firm's power. Moreover, other data shows that Amazon holds a 50% share of the printed book market in the U.S., which increases to 80% if reference is made to eBooks.[522] Moreover, Amazon is the first U.S. seller of electronic devices, with a percentage ranging between 65 and 70%, whilst Apple accounts for around 15-20%.[523] In Europe Amazon's share of online retail amounts to around 10%,[524] which is however a high percentage if we consider that in 2019 Amazon registered a 32.185 million euros turnover in Europe, whilst the second and the third companies of the list, *i.e.* Otto Group and Zalando, accounted respectively for a turnover of 'only' 6.910 and 6.483 million euros.[525] Moreover, Amazon is estimated to hold a share of 30% in both the UK and German ecommerce market.[526]

From an economic standpoint, Amazon's strategy in the short run was not aimed at distributing dividends to shareholders, but at acquiring even more market shares

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[520] R. McNamee, *Zucked. Waking Up to the Facebook Catastrophe*, Penguin, 2019, 103, quoted by A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 199.

[521] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 15. Other estimates provide a lower value, around 38%, see Amazon's share of online retail sales in selected regions as of September 2020, available at https://www.statista.com/statistics/1183515/amazon-market-share-region-worldwide/ (accessed 31 May 2021). The Congress was aware of these discrepancies but stated that other statistics gave underestimated Amazon's shares of online retail sales.

[522] D. Ravasi, *Il successo di Amazon. Una storia di cecità antitrust, monopoli naturali e pratiche commerciali scorrette*, Centro Einaudi Papers, 2021, 4, available at https://www.centroeinaudi.it/images/abook_file/Paper_Ravasi_febbraio_2021_2.pdf (accessed 31 May 2021).

[523] EcommerceDB, E-commerce revenue analytics about Amazon, available at https://ecommercedb.com/en/store/amazon.com (accessed 31 May 2021).

[524] *Amazon's share of online retail sales in selected regions as of September 2020*, cit.

[525] Top E-Commerce Retailers Europe 2020, available at https://www.retail-index.com/E-commerceretail.aspx (accessed 31 May 2021).

[526] J. Perry, *Europe Ecommerce Report*, Pattern, 16 November 2020, available at https://pattern.com/blog/europe-ecommerce-report-shows-marketplace-growth-key-trends/ (accessed 31 May 2021). See also the specific webpage about Amazon on Pattern's website, available at https://pattern.com/uk/marketplace/amazon/ (accessed 31 May 2021).

during the long run.[527] Indeed, until 2018, the firm's distribution of dividends was almost equal to zero.[528] Amazon's expansion towards its dominant position was characterised by acquisitions of competitors and various anticompetitive strategies. The former behaviour is well represented by the acquisition of firms like Zappos and Diapers.com.[529] With particular reference to Zappos, Amazon used a predation strategy, by selling shoes below costs, thus accumulating financial losses (around 150 million dollars). Finally, Zappos' management was obliged to sell the company.[530] An identical approach can be observed with regards to the book market.[531] In addition, the use of MFN (most favoured nation) or best price clauses – which bind third-party sellers not to sell their products at an inferior price on another platform – allowed Amazon to strengthen its power over sellers. The latter are indeed treated by the platform both as partners and competitors.[532] In fact, Amazon's internal documents, as pointed out by the abovementioned Congressional Report, define third-party sellers as 'internal competitors'.[533] Of course, this raises a conflict of interest between Amazon and the sellers, because Amazon is the place where they sell their products, but it is also a competitor, which, in certain occasions copied from sellers low-cost – but highly profitable – products in order to directly sell them through its Amazon Basics line.[534] Moreover, problems related to self-preferencing of Amazon products or products on which

[527] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 247.
[528] D. Ravasi, *Il successo di Amazon*, cit., 6. See also R. Molla, *Amazon's tiny profits*, explained, Vox, 24 October 2019, available at https://www.vox.com/recode/2019/8/21/20826405/amazons-profits-revenue-free-cash-flow-explained-charts (accessed 31 May 2021).
[529] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 16.
[530] D. Ravasi, *Il successo di Amazon*, cit., 8.
[531] *Ibidem*. In this context, an initiative by the Italian legislator in 2020 capped the percentage of possible discount on books from 15% to 5%, allowing however physical stores (but not online ones) to discount up to 15% in certain limited occasions. See Article 8, Law 13 February 2020, no. 15, published in OJ 10 March 2020, no. 63.
[532] D. Ravasi, *Il successo di Amazon*, cit., 8-9.
[533] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 16.
[534] L. Khan, *Amazon's Antitrust Paradox*, cit., 782; A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, Report for the European Commission, 24 August 2020, 40, available at https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11ea-ad25-01aa75ed71a1/language-en (accessed 29 June 2021).

Amazon earns more profits are also at stake.[535] This results particularly relevant if we think that sellers on Amazon's platform are generally small or medium sized companies which rely almost entirely on Amazon in order to reach final customers.[536] At this purpose, it is telling that in the U.S. more than a half of consumers starts searching for the desired products directly on Amazon.[537] In addition, Amazon can also exploit the data about sellers' activities in order to better understand market trends and having a broader picture of the relevant market tastes.[538] This allows the platform to better refine its market strategies in respect of third-party sellers which operate in the marketplace.

The issue regarding data is significant also with respect to other two Amazon's businesses, which are digital voice assistants and cloud computing. We have already mentioned the first one. In this case, Amazon, through Alexa, can gather a huge amount of data, but, above all, it might influence customers' purchase choice by means of self-preferencing strategies or, still, in favour of products that grant the platforms higher returns.[539]

In cloud computing Amazon operates through the current market leader, Amazon Web Services (AWS), which is used by a lot of Amazon's competitors, thus generating, again, conflicts of interest.[540] In particular, the U.S. Congressional Report found this conflict of interest in the integration of Amazon cloud services with the firm's other lines of business, like retail, video, music etc. In a nutshell, if Amazon's competitors in other sectors do not want to face fierce competition in other fields, it is better for them to choose AWS services.[541] As the Report clearly outlined *one venture capitalist described Amazon as "useful but "dangerous"*

[535] L. Khan, *Amazon's Antitrust Paradox*, cit., 754. At 779 the Author suggests that Amazon is also in a position to deliver its own products faster than those of independent sellers using its platform and fulfilment service.
[536] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 15.
[537] D. Ravasi, *Il successo di Amazon*, cit., 9.
[538] *Ibidem*, 10-11.
[539] M.E. Stucke and A. Ezrachi, *Is Your Digital Assistant Devious?*, cit., 8-11; A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 106.
[540] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 16, 245.
[541] *Ibidem*, 322.

because "it's hard to predict what Amazon wants to get into… you can't know.".[542] In a similar vein, it is reported that *a business-to-business application developer told Subcommittee staff that they felt pressure to switch their entire product to Microsoft Azure because of its client's concerns with Amazon's anticompetitive conduct in the online retail sector*.[543] Indeed, as the Report explicitly underlined, it is the same Amazon that suggests its employees to manage concerns of clients which are not willing to use AWS services for the fear of supporting a competitor by stating *how can you afford to not compete with the best possible tools in such a though market like retail?*[544]

Another sector in which Amazon has expanded is logistics, which allows Amazon to deliver products more rapidly and with a lower expense.[545] Anyhow, conflicts of interests emerge again in respect of the use of these services by third-party sellers, which, if they use Amazon's delivery service, may receive a better placement on the marketplace by the platform's algorithm.[546]

1.1. The AGCM decision against Amazon

This conduct led to a decision issued in December 2021 by the Italian Competition Authority. The AGCM imposed a 1 billion and 128 million euros sanction to Amazon.[547] The case was decided on the basis of Article 102 TFEU and it constitutes a plain example of how big intermediation platforms holding a dominant position in a market can leverage it into another market by means of self-preferencing exclusionary conducts leading to a decrease in the level of competition.[548] The Italian Authority found that Amazon leveraged its dominant position in the Italian market for intermediation services on marketplaces to force

[542] *Ibidem*.
[543] *Ibidem*.
[544] *Ibidem*.
[545] D. Ravasi, *Il successo di Amazon*, cit., 11.
[546] *Ibidem*.
[547] Autorità Garante della Concorrenza e del Mercato, decision 9 December 2021, case A528, *Amazon*, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/A528_chiusura%20istruttoria.pdf (accessed 16 March 2022). The relevant press release is available at https://en.agcm.it/en/media/press-releases/2021/12/A528 (accessed 16 March 2022).
[548] *Ibidem*, 704, 729.

sellers active on the platform to use its own logistics service, Fulfilment by Amazon (FBA).[549] In particular, Amazon used to link the choice of the FBA services to a better treatment for sellers active on the marketplace.[550] These 'benefits' included, for instance, higher visibility on the platform or the *Prime* label.[551] Furthermore, sellers using the FBA service were subjected to less stringent performance requirements than those using a competing delivery service.[552]

The AGCM found that Amazon's behaviour was capable of both damaging competing logistics services and marketplaces, as well. With regard to the former profile, logistics operators other than FBA were less likely to be chosen by sellers active on Amazon's marketplace.[553] As for the second parties harmed, the reliance on FBA discouraged online sellers to offer their products on other platforms, as this would have led to an inefficient use of more warehouses (linked to the different logistics services needed, respectively, for product sold on Amazon and on other marketplaces).[554] Amazon's conduct was therefore deemed anticompetitive by the AGCM and in doing so the Authority relied also on the recent *Google Shopping* judgement issued by the EU General Court (and analysed below). Indeed, the AGCM affirmed that in absence of an objective justification, the different treatment between the dominant companies' and the competing logistics services amounts to a behaviour falling outside competition on the merits, thus leading to a violation of Article 102 TFEU.[555]

In addition to the fine, the Italian watchdog imposed also behavioural remedies on Amazon,[556] thus confirming that they play a fundamental role in the Authorities' toolbox against tech giants.

After having analysed this decision it might appear more clear the description of Amazon's particularly strong market position made by a venture capitalist

[549] *Ibidem*, 685-687. FBA's functioning is well described by the AGCM at paragraphs 179-204 of the *Amazon* decision.
[550] *Ibidem*, 234-239, 690.
[551] *Ibidem*, 250-255, 691-693, 760-778.
[552] *Ibidem*, 240-249, 738-759.
[553] *Ibidem*, 803-825.
[554] *Ibidem*, 826-848.
[555] *Ibidem*, 723.
[556] *Ibidem*, 888-908.

interviewed during the Congressional investigation into digital markets. By means of an evocative metaphor, he compared Amazon to the sun and he stated *I think of Amazon as the sun. It is useful but also dangerous. If you're far enough away you can bask. If you get too close you'll get incinerated. So, you have to be far enough from Amazon and be doing something that they wouldn't do. If you're a net consumer of Amazon's infrastructure, like Uber, then you're okay. As long as Amazon doesn't want to get into ridesharing. But it's hard to predict what Amazon wants to get into. If they were going to stop at retail and computing, you're safe. But you can't know*.[557]

For the sake of concluding, Amazon may represent the example of an efficient firm, but it is here that stands what Lina Khan called the *Amazon Antitrust Paradox,*[558] *i.e.* the creation of a structurally enormous 'market empire' which can exercise its influence on 'internal competitors' and 'partners', thus conditioning their market behaviour, but through a *façade* compliant with the post-Chicago antitrust dogmas. This consideration depones in favour of an antitrust intervention more in line with a structuralist paradigm. However, in order to implement this approach into a coherent paradigm, it is necessary to analyse more in depth the main features that characterises digital markets, together with the implication they have on the antitrust discourse.

2. Digital markets' main features

2.1. The platform structure

As a starting point, it is worth highlighting how Amazon, Facebook (and its affiliated applications) and Google are often referred to as platforms, which operate in the so-called platform market. According to the Merriam-Webster dictionary, a platform is *an application or website that serves as a base from which a service is*

[557] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 49.
[558] L. Khan, *Amazon's Antitrust Paradox*, cit.

provided.[559] Indeed, Amazon uses its website to sell goods, Facebook or YouTube to provide and upload content and Google to offer a search service to users. Thus, a platform shall be seen as a medium, a junction, between the general public, that we can refer to as the consumers, and advertisers first, but also sellers or app developers. Obviously, the kind of actors present on the platform's 'hidden' side depends on the structure and the market function of the relevant platform. Although it is difficult to grasp and then explain in an accessible manner every platform's detail, we would try to proceed by simplifying, but without lowering our level of detail.

Platform markets are often described as multi-sided markets.[560] This field was deeply studied by Scholars such as Nobel Prize winner Jean Tirole, which, in a 2003 paper co-authored with Jean-Charles Rochet, provided an exemplar picture of competition among platforms in two-sided markets.[561] The Authors introduced their study by delineating one of platforms' main characteristics, that is network effects.[562] In fact, they pointed out that both sides of a two-sided platform desire a large participation by the actors posited on the other side. At this aim, as sustained by Evans, *to get both sides on board, businesses operate a "platform" that connects or coordinates the activities of multiple groups of customers*.[563] For instance (the article was written in 2003), Rochet and Tirole suggested as players of video games want a console with a lot of games to play as well as game developers invest in games for consoles with a large audience. The same can be applied to credit cards: A good credit card is accepted by a lot of stores, which, in turn, accept credit cards widespread among consumers.[564] Also newspapers are regarded as a multi sided market, given the contemporary presence of readers and advertisers. Focusing on more recent markets – although gaming consoles, credit cards and newspapers still

[559] Under meaning 6.b, available at https://www.merriam-webster.com/dictionary/platform#:~:text=1%20%3A%20a%20flat%20surface%20that,looked%20out%20into%20the%20audience. (accessed 1 November 2021).
[560] OECD, *Quality considerations in digital zero-price markets*, 28 November 2018, 16, available at https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf (accessed 26 June 2021).
[561] J. Rochet and J. Tirole, *Platform Competition in Two-Sided Markets*, Journal of the European Economic Association, 2003, 1, 4, 990.
[562] In this respect, see also AGCM and Others, *Indagine conoscitiva sui big data*, cit., 72.
[563] D.S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, Yale Journal on Regulation, 2003, 20, 328.
[564] J. Rochet and J. Tirole, *Platform Competition in Two-Sided Markets*, cit., 990.

constitute valuable and up-to-date examples – the same considerations can be applied to social networks, e-commerce platforms, search engines and operative systems. Indeed, in social networks the larger is the users' base, the most attractive the platform is for users (think about the desirability of a social network with a low level of subscribers) and, consequently, the most interesting the social network is for advertisers. But, given the huge users' portfolio, the platform can negotiate with advertisers from almost a dominant position (if the platform is Facebook, with its user's base, comprehensive of Instagram and WhatsApp users, where advertisers can go alternatively if they do not accept Facebook conditions?). The described network effects,[565] which attract users to the 'mainstream' platform or service, as pointed out by the Italian AGCM, progressively leads the market to tip in favour of that platform or service provider, thus concentrating a huge amount of market power into its hands.[566] Moreover, this tipping effect may also persist because of the presence of high switching costs for users. Indeed, they may not find other technically compatible services, or they may experience the so-called lock-in effects,[567] generally caused by the abovementioned network effects:[568] If all or the majority of a person's friends are on Facebook or communicate through WhatsApp, s/he will definitely remain locked into these services, without the possibility of switching to competing ones without suffering a decrease in her/his welfare.[569]

The considerations expressed above may be better clarified by reporting that Facebook accounts for 2.740 million users (with WhatsApp counting 2.000 million ones, Instagram 1.221 million and Facebook Messenger 1.300 million), whilst

[565] For the sake of completeness, network effects can be both 'direct' or 'indirect': 'Direct network effects' occur when users interact directly on the platform, thus increasing the product's appeal among users placed on the same side of the platform, while 'indirect network effects' occur in case a high use of the product on one side of the platform increases its appeal to users placed on other sides, as well. See OECD, *The Digital Economy 2012*, 2013, 8, available at https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf (accessed 12 September 2021).

[566] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 72. See also, EU Commission, *Competition Policy for the Digital Era*, cit., 22-23; UK Government, *Unlocking digital competition*, cit., 35; Autorité de la Concurrence and Bundeskartellamt, *Competition Law and Data*, cit., 27-28; C. Shapiro and H.L. Varian, *Information Rules: A Strategic Guide to the Network Economy*, Harvard Business Press, 1998, 184-185.

[567] J.B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law*, cit., 3.

[568] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 72.

[569] M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy*, cit., 144.

WeChat account 'only' for 1.213 million, TikTok 689 million and Snapchat 498 million.[570] The result is that the whole Facebook 'galaxy' significantly outperform the competitors, with the exception of YouTube, having 2.291 million users,[571] but it should not to be considered a significant information, given that YouTube provides a quite different experience. In a similar vein, if a search engine performs the majority of users' daily queries, it holds a sort of dominant position vis-à-vis advertisers, which pay in order to know what the users' requests are, both at a general and at a personal level, so as to provide ads which are ever better personalised and targeted to users. In this case, the number of search queries submitted by the *internautes* constitutes an important factor because search engines are essentially based on searching algorithms, but these algorithms need to be trained and this occurs through a 'trial and error' process.[572] As a result, the higher is the number of searches performed by the algorithm, the most precise it will be. As a consequence, the most popular a search engine will be among users and the most attractive it will become on the other side of the platform.[573] Also in this case, Google is able to negotiate with advertisers from a favourable position, because switching to alternatives may prove not satisfactory both for users and advertisers. In fact, data show that during the last eleven years Google kept a stable and enduring position of power in the search engine market, with market shares stably above 85 percent.[574] It is telling that Google's lower level of market share was registered in July 2018, with an 'incredibly low' level of 86,02 percent, whilst Google's best opponent, Microsoft's Bing, reached its height in the same period with a 6.55 percent share.[575] Moreover, these data refers to desktop searches, where users could feel more encouraged to try alternatives, in respect of when using an Android device

[570] Most popular social networks worldwide as of January 2021, ranked by number of active users, available at https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (accessed 1 June 2021).
[571] *Ibidem*.
[572] M.E. Stucke and A. Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, The Yale Law Journal of Law & Technology, 2016, 18, 82-85. This process has been analysed also with reference to digital assistants by M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 186.
[573] *Ibidem*.
[574] Worldwide desktop market share of leading search engines from January 2010 to February 2021, available at https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/ (accessed 1 June 2021).
[575] *Ibidem*.

(the predominant mobile operating system, with, in January 2021, a market share of 71.93 percent, in respect of the 27.47 percent referred to Apple's iOS[576]), with Google Chrome (which obviously uses Google as default search engine) pre-installed. Google's position of force is evident also if we read the data reported in light of the fact that on Windows PCs (which represent the prevailing desktop operative system with, as of April 2021, a market share of 74.94 percent, whilst Apple's OSX holds a minority quota of 16.02 percent[577]) the pre-installed internet browser is Microsoft Edge, which uses Bing as default search engine. The percentages of Google and Bing in the desktop search engines market are suggestive: Google's default effect on users overcomes the pre-installation of another search engine on the majority of PC users.[578]

The reference made about operative systems' share may now return useful, because also operative systems are a good example of two-sided markets. In fact, the more an operative system, like Windows, is used, the more apps developers will provide applications working on this OS. Entry barriers are particularly evident in this field, because not being a popular operative system may cause exit from the market.[579] The power that operative systems can exercise on app developers is illustrated by the well-known *Microsoft* cases, based on the tying of pre-installed Microsoft's Internet Explorer browser or Windows Media Player on PCs running Windows.[580] Users could not have bought PCs without any browser or media player already installed, but they were obliged to buy PCs with the two Microsoft products already installed, with the consequence that network effects (Microsoft, like today, was in absolute the most popular desktop operative system), together with the choice for a default option (users are likely to run the pre-installed internet browser, instead of

[576] Mobile operating systems' market share worldwide from January 2012 to January 2021, available at https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/ (accessed 1 June 2021).
[577] Desktop Operating System Market Share Worldwide, available at https://gs.statcounter.com/os-market-share/desktop/worldwide (accessed 1 June 2021).
[578] Desktop Browsers Market Share Worldwide, available at https://gs.statcounter.com/browser-market-share/desktop/worldwide (accessed 24 April 2022).
[579] Examples are well-known: Windows Phone failed, as it could not compete with Android and iOS, because no apps were available on its app stores and, consequently, users did not buy smartphones running Windows.
[580] This dynamic is brilliantly analysed by M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 206-208.

opening that browser and downloading the competing one, with the exception, also caused by dominance, now represented by Google Chrome) led to the exclusion of rivals, also if they were delivering more performing products.[581] In fact, the bundling of Internet Explorer and Windows made Netscape Navigator, which was the dominant internet browser by the end of 1990s, to leave the market in favour of Microsoft's browser[582] and led to an antitrust lawsuit against Microsoft filed by the U.S. Department of Justice.[583] However, this initiative, after victories both at the District Court and Appeal levels, was settled after the George W. Bush Administration came to power.[584] Microsoft was investigated in the EU as well. In the case regarding Windows Media Player, the European Commission adopted an infringement decision providing – beyond the fine – that Microsoft had to offer a version of Windows without Windows Media Player pre-installed.[585] However, the freedom of Microsoft to also offer a bundled version with Windows Media Player was recognised.[586] In the subsequent case involving Internet Explorer, instead of an infringement decision, commitments under Article 9 of Regulation 1/2003 were agreed.[587] In particular, Microsoft accepted to provide a sort of 'choice screen' aimed at allowing users to proactively choose the internet browser they would have preferred.[588] This second remedy shall be regarded as better 'tailor-made' and effective, because it envisaged a more active role of users, which are not only

[581] D. Gore, *Ex Post Assessment of European Competition Policy: The Microsoft cases*, Draft report prepared for the 2021 Annual Conference of the GCLC, 2021, 12-15, available at https://www.coleurope.eu/sites/default/files/uploads/page/gclc_report_draft_-_the_microsoft_cases.pdf (accessed 1 November 2021).
[582] *Ibidem*, figure 2 is particularly evocative. See also T. Wu, *The Curse of Bigness*, cit., 104.
[583] U.S. Department of Justice, Complaint: U.S. v. Microsoft Corp., Civil Action No. 98-1232, filed before the United States District Court for the District of Columbia on 18 May 1998, available at https://www.justice.gov/atr/complaint-us-v-microsoft-corp (accessed 1 November 2021).
[584] T. Wu, *The Curse of Bigness*, cit., 106-107.
[585] European Commission, decision 24 March 2004, case COMP/C-3/37.792, *Microsoft*.
[586] A. Frignani and S. Bariatti, *La disciplina della concorrenza nella UE*, Cedam, 2012, 339, see, in particular, footnote 207. This decision was then confirmed by the EU General Court, decision 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission*.
[587] European Commission, Antitrust: Commission accepts Microsoft commitments to give users browser choice, 16 December 2009, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941 (accessed 1 November 2021).
[588] D. Gore, *Ex Post Assessment of European Competition Policy: The Microsoft cases*, cit., 16; A. Frignani and S. Bariatti, *La Disciplina della concorrenza nella UE*, cit., 341.

provided with an operative system without any pre-installed browser, but they are also informed about the browsers available for download.[589]

With regard to e-commerce, we have already described Amazon's structure and market power. Consequently, as we have seen, almost all third-party sellers have to rely on Amazon for placing their products. This position, however, is a consequence of the multi sided structure of Amazon's platform, as well. In fact, the more consumers are searching for products on Amazon, the more sellers want and need to operate on Amazon, with all the consequences, such as the launch of Amazon Basics products, the gathering of third-party sellers data for the benefit of Amazon itself and, finally, the placement of products, regulated by an algorithm programmed by Amazon, which can place an Amazon Basic product – or from a seller 'friend' of Amazon – above other products, precisely as occur with Google's search algorithm. The effect of placing products in a better position appears particularly important if we consider that the first five results ranked in Google account for 67.6 percent of clicks, whilst the remaining receive only the 3.73 percent of clicks.[590] This situation allows dominant or however powerful platforms to act as 'gatekeepers'.[591] This dynamics tend to favour conduct of self-preferencing

[589] D. Gore, *Ex Post Assessment of European Competition Policy: The Microsoft cases*, cit., 16.
[590] K. Shelton, *The Value Of Search Results Ranking*, Forbes, 30 October 2017, available at https://www.forbes.com/sites/forbesagencycouncil/2017/10/30/the-value-of-search-results-rankings/?sh=302028144d3a (accessed 1 June 2021).
[591] Or 'gamemakers', as suggested by A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 192-193. In this latter sense, they have the power to decide the rules of the 'game' and, consequently, to establish who can be ranked better in internet or marketplace searches, which product is 'suggested' (e.g., 'Amazon Choice' products. According to the Authors, at 105-106, Amazon is also facilitated in this 'product suggestion', as the high amount of products available on the platform generates a choice overload for consumers, and Amazon, with its advise (also through Alexa) is ready to 'guide' the consumer through the better product (but better for whom?))[591] and, indirectly, which seller or app developer shall perform better or, in the worst scenario, leave the market. Moreover, such a huge amount of power might allow the 'gamemakers' not to select the better performing apps or products, but those pertaining from a seller or a developer which follows the platform's 'guidelines', thus excluding who produced a better item, but is less prone to the gatekeeper's directives (at 214). In this sense, several investigations have been started with regard to app stores, as this is one of the fields where dominant platforms exercise their highest degree of almightiness. See, for instance the investigations having regard to the Apple App Store, started respectively by the German Bundeskartellamt (based on the new Section 19a GWB) on 21 June 2021, whose press release is available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html (accessed 30 June 2021) and by the UK Competition and Market Authority on 4 March 2021, whose information are available at https://www.gov.uk/cma-cases/investigation-into-apple-appstore (accessed 30 June 2021). Also the European Commission on 30 April 2021 sent a statement of objections to Apple with regard to its App Store rules for music streaming providers, as explained

by dominant firms, which have led to several decisions issued by competition Authorities and that it is worth analysing in order to better understand this kind of anticompetitive behaviour.

2.1.1. A leading decision: The Google Shopping case

The *Google Shopping* case[592] involved a self-preferencing conduct carried on by Google with the aim of favouring its own comparative shopping service vis-à-vis the competing services. In this case the Commission fined Google with a Euro 2,424,495,000 fine.

This probe shows how a dominant digital gatekeeper may easily favour its own products, although if not performing well in the market, in respect of better competing products or services. Indeed, if the main platform or digital firm acts as a gatekeeper, it may well distort the competitive dynamics in the market it dominates. With regard to the relevant market definition, the Commission held that the product markets to be considered in this case are the market for general search services and the market for comparison shopping services.[593] The Commission decision then established that Google held a dominant position in the general search services market in each EU Member State since 2008 (except for the Czech Republic, where Google became dominant in 2011).[594] In order to ascertain this aspect, the Commission relied on general categories used in the analysis of antitrust

in the relevant Commission's press release, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061 (accessed 30 June 2021). On this topic see also the interesting paper by D. Geradin and D. Katsifis, *The antitrust case against the Apple App Store*, TILEC Discussion Paper DP 2020-039, 22 April 2020, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3814706_code524065.pdf?abstractid=3583029&mirid=1 (accessed 30 June 2021).

[592] European Commission, decision 27 June 2017, case AT.39740, *Google Search (Shopping)*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (accessed 28 May 2021). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 28 May 2021) and a summary of the decision has been published in the Official Journal of the EU, 12 January 2018, C 9/11. See, *inter alia*, comments on this case by K. Bania, *The European Commission's decision in Google Search*, in B. Lundqvist and M.S. Gal (Eds.), *Competition Law for the Digital Economy*, cit., 264-301; B. Mäihäniemi, *Competition Law and Big Data*, cit., 110-272.

[593] European Commission, *Google Shopping*, cit., point 154.

[594] *Ibidem*, point 271.

cases, which were however declined into a digitalised context. In particular, apart from the market share level reached by Google, the Commission found that the general search market was characterised by strong barriers to entry and expansion, due exactly to Google's dominance in this market. Furthermore, the Commission observed a very low level of multi-homing by users, caused by brand effects favouring Google, together with the absence of a countervailing buyer power exercised by consumers.[595] With a fundamental statement for the application of competition rules in digital markets and for market definition in this context, the Commission declared that all the above reported considerations were valid notwithstanding the fact that users do not pay a monetary price for the general search service offered by Google.[596]

Having regard to the conducts sanctioned by the Commission, Google was accused - given the analysed market position in the general search services market – of favouring, without any efficiency reason identified by the Commission, its own shopping comparison service by demoting competing tools in the list of results provided by the Google's general search engine. In particular, Google needed to improve the performances of its shopping comparison service (Froogle, then Google Shopping), which, according to a Google's executive, *simply doesn't work*.[597] This conduct was considered in violation of Article 102 TFEU because it had the effect of diverting – due to the general search ranking – traffic from competing comparative shopping services to Google's one and, consequently, to have the effect of distorting competition in the relevant markets for general search services and comparative shopping services.[598]

With regard to the manner in which Google put these conducts into practice, the Commission recognised the central role of the algorithm used by the Google's general search engine, which determined the positioning of webpages in the results list. However, whilst competing comparative shopping services were subject to this

[595] *Ibidem*, point 272.
[596] *Ibidem*, point 320. See also point 158.
[597] Google's reply to the Commission's request for information, 27 February 2007. See European Commission, *Google Shopping*, cit., para 490. The same paragraph of the decision also reports another Google executive stating on 13 March 2006 that *Froogle isn't really a serious contender today*.
[598] European Commission, *Google Shopping*, cit., point 341.

algorithm, Google Shopping was not, and it was placed among the first search results and showed with enriched features not available to competing services.[599] After having observed how Google concretely favoured its own shopping comparison services, the Commission analysed the impact of this conduct on competition. In particular, it acknowledged that users tend to select the highest ranked results on the general Google search service,[600] with the result that the order in which they are placed determines also the users' traffic on the relevant websites. This assumption was confirmed by empirical evidence gathered by the Commission during its investigation. The focus was then placed on the specific shopping comparison services sector, and it was observed from evidence that Google Shopping's better positioning on the general search results has been followed by an increase in the users' traffic on this service.[601] Consequently, Google's behaviour was judged as leading to anticompetitive effects stemming from Google's dominant position in general search services, which lead to the self-preferencing of its own shopping comparison service, which, as showed, did not improve its market performances by means of its superior characteristics (*i.e.*, through competition on the merits), but only thanks to an 'abusive' better positioning awarded by Google itself.[602] It was also sustained that this conduct's effects on competitor shopping comparison services was exacerbated by the lack of alternatives for them out of Google in order to reach consumers.[603] As a consequence, Google's behaviour was judged as a foreclosure for competing comparative shopping services, which could have potentially led to higher disbursements for both merchants and consumers and also it was also capable of stifling innovation.[604] Finally, consumer welfare was deemed reduced also because this 'artificial' ranking of shopping comparison services made by Google did not allowed consumers to choose without influence the best shopping service available, as Google's conduct, together with their

[599] *Ibidem*, 344 and 379. For the entire analysis see 344-443.
[600] *Ibidem*, point 454, see, in particular, Table 19. For the entire analysis see 454-461.
[601] *Ibidem*, 452.
[602] *Ibidem*, 534-538.
[603] *Ibidem*, 642.
[604] *Ibidem*, 595-596. In particular, innovation can be stifled with respect to both Google's and competing shopping services. Indeed, with regard to the latter, they have incentives to innovate if they could attract a sufficient volume of users to compete with Google. With reference to Google Shopping because providing more innovative products is not necessary, as it does not need to compete on the merits with competing services.

behavioural biases, made them choose the first showed one, which was Google's service.[605]

The Commission's decision was recently confirmed (almost completely) by the General Court on 10 November 2021.[606] The Luxembourg Judges upheld the euro 2,42 billion fines. The General Court first recognised that Google's behaviour of favouring its own comparison shopping service by means of better positioning and display – with the consequent relegation of competing comparison services – did not amount to competition on the merits (which, obviously, also a company benefitting of a dominant position can perform).[607] In particular, the Court stated that Google did not discriminate results on the basis of their quality, rather on their origins, by favouring its own comparison shopping service.[608] The damage to competition derived by the combination of the poor placement on Google Shopping's results page and the decrease of traffic to competing comparison shopping services due to this poor placement. Indeed, the Court recognised that *Google's general results page has characteristics akin to those of an essential facility […], inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market, […] as is apparent […] that generic search traffic from Google's general results pages accounted for a large proportion of traffic to competing comparison shopping services and that such traffic could not be effectively replaced by other sources or traffic currently available to comparison shopping services*.[609] The Court rejected Google's argument regarding the failure by the Commission to apply the rigid criteria set out in the *Bronner* judgement[610] with regard to refusal to supply conduct.[611] In fact, the General Court did not recognise in Google's behaviour a refusal to supply, but an independent infringement of Article 102

[605] *Ibidem*, 597.
[606] EU General Court, decision 10 November 2021, case T-612/17, *Google and Alphabet v. Commission (Google Shopping)*. The relevant ECJ press release is available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf (accessed 5 April 2022).
[607] *Ibidem*, 233.
[608] *Ibidem*, 285.
[609] *Ibidem*, 224-225.
[610] European Court of Justice, decision 26 November 1998, *Oscar Bronner GmbH & Co. KG v. Mediaprint*.
[611] *Ibidem*, 122.

TFEU, in the form of an implicit refusal to access or however a form of leveraging involving active acts of discrimination in the placement of results on Google's general results page.[612] Therefore, the Court confirmed that Google's conduct infringed competition law. Moreover, on the concept of abuse – and this is relevant for understanding again the 'soul' of EU competition law – the Judges affirmed that *the abuse of a dominant position prohibited by that provision [Article 102 TFEU] is an objective concept that refers in particular to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing or the growth of that competition*.[613] It is worth here noting that this statement might remind an approach taking into consideration the concept of competition as such that we have explored in chapter 4.

This decision represents a milestone in the field we are analysing because it reached one of the highest sanctions imposed by the European Commission, but above all because it is the first big case (if we except the *Microsoft* one, which – although it shares some similarities with cases involving actual big techs – is slightly different) against a big tech firm in the era of digitalisation. In particular, the analysis of Google's network effects was commendable, paired with the Commission's reliance on evidence showing users' behavioural biases. Of course, this case represents only the first step of a process, the foundations of a renewed approach to competition law capable of understanding the peculiarities of the digital environment. This case was however only the first one in this trail, and this approach by the Commission was followed and confirmed in a subsequent case, still against Google, but with reference to its Android mobile operating system.

[612] *Ibidem*, 233, 240.
[613] *Ibidem*, 437. See also 503-504.

2.1.2. Consistency in the Commission's approach: The Google Android case

After having sanctioned Google in 2017, the European Commission started a new investigation into the Mountain View company, which saw its outcome in 2018 with the imposition of a Euro 4,342,865,000 fine.[614] Object of this decision were agreements regulating the usage of Android mobile operative system, together with some apps provided by Google itself.

The relevant markets identified by the Commission were the worldwide market for the licensing of mobile operating systems, the worldwide market for Android app stores and the worldwide market for non-OS specific mobile web browsers (with regard to the former two markets, China was excluded by the relevant territorial scope). Moreover, also national markets for general search services were included into the probe's perimeter.[615] At this purpose, the Commission sustained that Google held a dominant position in all these markets.[616] In detail, as established during the *Google Shopping* investigation, the Commission affirmed that Google's dominant position in the general search services market is founded on its market shares,[617] together with barriers to entry[618] and the infrequency of multi-homing by users.[619] In a similar vein, dominance on the worldwide mobile OS market and on the Android app stores one is based on the same market shares and barriers to entry and expansion arguments.[620] Furthermore, with regard to the mobile OS market, also the insufficient competitive pressure exercised by other mobile operative systems, like Apple's iOS, was taken into account.[621] Conversely, with reference to the Android app stores market, the Commission affirmed that Google's dominance

[614] European Commission, decision 18 July 2018, case AT.40099, *Google Android*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf (accessed 21 May 2021). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 21 May 2021) and a summary of the decision has been published in the Official Journal of the EU, 28 November 2019, C 402/19.
[615] *Ibidem*, 402.
[616] *Ibidem*, 8, 10-12. See, in particular, Sections 9, 11, 12, 13.
[617] *Ibidem*, 686-685.
[618] *Ibidem*, 686-708.
[619] *Ibidem*, 709-714.
[620] *Ibidem*, having regard to the worldwide mobile OS market, respectively, 442-460, 461-473, 474-478. With reference to Android app stores market, respectively, 591-605, 627-642, 643-651.
[621] *Ibidem*, 481.

was also sustained by the quantity of apps available on Google Play Store, the relative automatic update feature and the fact that the only way for mobile device producers to obtain the – essential – Google Play Services, was to add also the Google Play Store.[622]

Since Google's dominance on these markets was established, the Commission sustained that Google put into practice several anticompetitive conducts. In particular, the first contested behaviour consisted in tying the Google Search app with the Google Play Store.[623] With some similarities with the previous *Microsoft* case, the Commission held that this behaviour consisted in an abuse of dominant position in the Android app stores market, since Google was dominant in this market and the Google Play Store cannot be obtained without the tied product (the Google Search app). This tying practice, observed the Commission, was capable of maintaining or reinforcing Google's dominant position in the general search market because competing providers were more unlikely to reach users due to barriers to entry.[624] Indeed, as we have analysed, the presence of the bundled Google Search app might discourage users in searching for an alternative web search app, downloading and using it, given that they tend to prefer the pre-installed default option.[625] The same reasoning was also applied with regard to the different market for non OS-specific mobile web browsers, since Google, together with the Google Search app, tied also Google Chrome's mobile version to its Play Store.[626]

The Commission then analysed Google's conduct vis-à-vis hardware manufacturers. In particular, the investigation found that Google made the licensing of both the Google Play Store and the Google Search app conditional to the acceptance – by device manufacturers – of an anti-fragmentation agreement (AFA).[627] The obligation contained into this agreement were aimed at preserving Google's dominant position in the case's relevant markets. In particular, the AFA's provisions obliged hardware manufacturers to distribute only Android compatible

[622] *Ibidem*, 590. See, respectively, 606-614, 615-620, 621-626.
[623] *Ibidem*, 754. For the entire analysis see 754-876.
[624] *Ibidem*, 858-862.
[625] *Ibidem*, 782.
[626] *Ibidem*, 877. For the entire analysis see 877-992.
[627] *Ibidem*, 1001-1187.

devices. Furthermore, they were required not to take actions that would have caused the fragmentation of Android and not to distribute software development kits derived from Android or Android compatible devices.[628] These requirements were aimed at preventing the creation of the so-called 'Android forks',[629] which are alternative version of the Android OS not approved by Google. In substance, if device manufacturers were wishing to sell devices running pre-installed Google proprietary apps, they were required not to develop these Android forks and, as found by the Commission, these obligations have led manufacturers, for instance, not to produce devices running Amazon's own Android fork, called Fire OS. This, of course, had the consequence of limiting producers and consumers' choice, but also innovation (in case an Android fork was more innovative than the 'official' version).[630] Internal Google documents analysed during the investigation confirmed the purpose of this practice, by stating that AFAs were directed at *stop […] our partners and competitors from forking Android and going alone*.[631] Moreover, in order to sell their products with the Android brand, manufacturers were required to pass the so-called 'Android Compatibility Test', whose requirements were established discretionarily by Google itself.[632] In light of the above, and considering that entering into an AFA shall not be considered – in a competitive environment – necessary in order to obtain the Google Play Store and Google Search app licenses, the Commission found Google's behaviour capable of restricting competition also with regard to the AFAs and Android forks profiles. In particular, the latter were considered a threat to Google's market position, but by means of the AFAs, this danger was neutralised, and Google's dominant position maintained. Moreover, the strict approval requirements – established by Google's itself – at which 'compatible' forks were subject led to the result of having on the market only 'defused' alternative versions of Android, which, obviously, did not represented a concrete risk for Google. Anyhow, as it results evident, Google acted exactly as a gatekeeper – abusing of its dominant position – both in making AFAs compulsory for device manufacturers and in keeping its discretion about every Android fork's

[628] *Ibidem*, 157.
[629] *Ibidem*, 1346.
[630] *Ibidem*, 1139-1145.
[631] *Ibidem*, 160.
[632] *Ibidem*, 161-163.

approval. This, as anticipated, has obviously caused harm to both consumers and manufacturers, as well as to innovation.

However, Google's conduct was not limited to a sort of 'passive' promotion of its own applications and services, but it also proactively 'encouraged' device manufacturers and network operators not to pre-install on their devices apps that could constitute a competitive threat to Google's ones. In particular, 'Big G' granted monetary subsidies to mobile network operators and hardware manufacturers in order not to pre-install competing search services. As found by the Commission, this conduct constituted an abuse of dominant position by Google in the defined national markets for general search services.[633] Noteworthily, it is curious to note that from a recent antitrust lawsuit filed in the U.S. by 36 States against Google,[634] it appears that payments in order to prevent competition from rivals is a Google's common strategy. In fact, it is sustained that the Mountain View firm has paid Samsung in order not to develop its own Galaxy (app) Store, which, after its recent 'revamping', was considered a threat for Google Play Store. In particular, allegations sustain that Google both paid Samsung for not entering in commercial relationships with top app developers and it encouraged the latter not to distribute their apps outside Google Play Store.[635] Indeed, according to the complaint, *to Google, competition in app distribution is a virus to be eliminated*.[636]

Returning to the *Google Android* case in the EU, in light of what we have described above, the Commission urged Google to cease the described behaviours and

[633] *Ibidem*, 1192. For the entire analysis see 1188-1336.
[634] D. Newman, *36 States Sue Google Over Aggressive Terms As Big Tech Remains In Focus*, Forbes, 12 July 2021, available at https://www.forbes.com/sites/danielnewman/2021/07/12/36-states-sue-google-over-aggressive-terms-as-big-tech-remains-in-focus/?sh=3301f4bc6a9f (accessed 12 July 2021); S. Morrison, *Google is facing yet another major antitrust lawsuit*, Vox, 7 July 2021, available at https://www.vox.com/recode/2021/7/7/22567656/google-play-store-states-antitrust-suit-letitia-james-utah-new-york-north-carolina (accessed 12 July 2021).
[635] J. Porter, *Google feared Samsung Galaxy Store and tried to quash it, lawsuit alleges*, The Verge, 8 July 2021, available at https://www.theverge.com/2021/7/8/22568111/google-play-android-samsung-galaxy-store-quash-threatened-app-distribution-antitrust (accessed 12 July 2021).
[636] The case was filed on 7 July 2021 before the United States District Court, Northern District of California, San Francisco Division, and it is led by the State of Utah Attorney General. The text is available at https://attorneygeneral.utah.gov/wp-content/uploads/2021/07/Utah-v-Google.1.Complaint-Redacted.pdf (accessed 12 July 2021). The reported quotation can be found at point 146. At point 133 it is also reported that *Google felt deeply threatened when Samsung began to revamp its own app store, the Samsung Galaxy Store*.

imposed the indicated fine. This decision was substantially upheld by the General Court in its decision issued on 14 September 2022.[637]

As we have already pointed out, the *Google Android* case – together with the *Google Shopping* one – constitutes an important starting point for the application of competition rules in digital markets. Indeed, the Commission's findings in these decisions amount to a precious 'evidentiary' heritage about the functioning of one of the main tech giant. Anyhow, these decisions showed how existing competition rules and concepts may be tailored for fitting digital markets, but they did not provide for new theories, interpretations and also remedies. In this sense, they may be viewed from two different perspectives, a positive and a negative one: The positive perspective accounts for a competition watchdog which was flexible and effective in adapting existing rules to emerging problems, whilst the negative side may observe that more digital markets-linked issues, such as privacy, did not constitute the core of these investigation. Furthermore, it results evident, as well, that existing remedies failed to correct the defined markets' tipping in favour of Google. Indeed, the Commission imposed the two highest fines ever in EU competition law, but this constituted only the 'cost of doing business' for Google. In substance, these decisions shall be regarded as a good starting point, but also as a warning that much more work is still needed in order to properly address the challenges posed by digitalisation.

In this sense, several National Competition Authorities, after the two analysed Commission's proceedings, have issued particularly important decisions in which they further develop the enforcement of competition law in the digital sector.

2.1.3. Solutions found at the national level: The AGCM decision on the Enel X's app's foreclosure by Android Auto

The Italian Competition Authority's decision against Google, issued on 27 April 2021, sanctioned the company for having foreclosed Android Auto's access to the

[637] EU General Court, decision 14 September 2022, case T-604/18, *Google LLC and Alphabet, Inc. v. Commission (Google Android)*.

Enel X's *Juicepass* app.[638] The AGCM based this probe on Article 102 TFEU, and imposed on Google both a monetary fine and a behavioural remedy. Having regard to the former, the fine amounts to 102,084,433.91 euro, whilst – more interestingly – the behavioural remedy consists in granting Enel X the possibility to develop apps which can gain access to the Android Auto platform.

The AGCM first analysed the strong market position gained by Google in Italy, where at least 3 smartphones out of four run the Android operative system.[639] Moreover, the decision analysed how an app developer might publish an app compatible with Android Auto. First of all, this app has to be published via the Google Play Store, but, as a second requirement, the app shall also be developed through the developing instruments made available by Google itself.[640] From this brief analysis it results evident how much power Google holds in this context.

Having regard to Android Auto, it is worth clarifying that it is a system, which users can download as an app from the Play Store, enabling them to benefit from a sort of car-adapted version of their Android device while they are driving an Android Auto-compatible car. Of course, this system allows drivers to use their smartphones by means of an adapted interface, which, above all, is specifically designed for not causing distractions. Anyhow, as we have already pointed out, not all the apps present on the Play Store may be launched on Android Auto. By its side, Enel X developed its own *Juicepass* app, which is directed at electric vehicles driver, in order to find and book charging stations, as well as to manage the entire charging process. It is evident that the launch of such an app in a time when electric cars are dramatically expanding is crucial for both the app developer's aims and the whole electric automotive sector. Indeed, at this purpose, using apps that improve the use of electric technologies may prove very beneficial for the transition towards sustainable vehicles. From this extent, it can be observed that the foreclosure of this app from Android Auto might create harm to innovation in the electric automotive

[638] Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, *Enel X – Android Auto*, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf (accessed 22 July 2021). The relevant press release (in Italian only) is available at https://www.agcm.it/media/comunicati-stampa/2021/5/A529 (accessed 22 July 2021).
[639] *Ibidem*, 39.
[640] *Ibidem*, 43.

sector in general as well as to Enel X.[641] In fact, users may well find other apps and then stuck with them, without turning to Enel X. Having regard to the latter profile, the foreclosure from Android Auto, which, according to the AGCM, lasted since more than two years, it might have undermined *Juicepass*' possibilities to hit users and effectively compete for the market in a crucial moment for its expansion.[642]

Google's abuse consisted in excluding *Juicepass* from being available on Android Auto in order to self-preferencing its own Google Maps app, which is present on Android Auto.[643] It is worth underlining how this app, at the time of the probe, did not offer users services related to the booking of charging stations and to the charging process' management and payment, thus offering only a charging stations finder tool.

2.1.4. The Autorité de la Concurrence's self-preferencing case against Google

Self-preferencing of its own services by Google lies also at the foundations of the decision issued on 7 June 2021 by the French Autorité de la Concurrence.[644] In detail, Google was sanctioned with a 220 million euro fines for having self-preferred its own services (Google Ad Manager) vis-à-vis competing ones. The decision does not amount to an infringement decision, but it is based on commitments proposed by Google and accepted by the French watchdog. The relevant market has been identified as that of advertising servers for websites and mobile apps publishers. Google's self-preferencing conduct was capable of harming both publishers and competing firms. The Autorité de la Concurrence underlined how Google, being it the dominant company on the relevant market,

[641] *Ibidem*, 413.
[642] *Ibidem*, 266.
[643] *Ibidem*, 374.
[644] Autorité de la Concurrence, decision 7 June 2021, 21-D-11, *Google*, available (in French only) at https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-06/21d11_0.pdf (accessed 22 July 2021). The relevant press release (in French only) is available at https://www.autoritedelaconcurrence.fr/fr/article/lautorite-de-la-concurrence-sanctionne-google-hauteur-de-220-millions-deuros-pour-avoir (accessed 22 July 2021). See also *Publicité en ligne: Google condamné à une amende de 220 millions d'euros par L'Autorité de la concurrence*, Le Monde, 7 June 2021, available at https://www.lemonde.fr/pixels/article/2021/06/07/publicite-en-ligne-l-autorite-de-la-concurrence-inflige-a-google-une-amende-de-220-millions-d-euros_6083210_4408996.html (accessed 22 July 2021).

would have to behave according to a special responsibility placed upon dominant firms.[645] In particular – in a way that partially reminds the Italian Android Auto decision – did not grant full interoperability of its own services with third-party services. Google, tellingly, has not contested the facts and, indeed, it has proposed commitments.

2.2. The market of attention: How market power can influence digital users' choices

We have already mentioned that one of the most important activities of platforms is keeping the users' attention ratio at the highest levels, so as to better gather behavioural information about them. In order to achieve this result, platforms have created an environment which 'hooks' users by inner features available in the platform's ecosystem itself and in third-developers' apps. With regard to platforms, the most significant example is represented by the Facebook ecosystem, which includes, *inter alia*, also Instagram. We have already mentioned the average number of hours spent by users every day on Instagram and Facebook. What is significant is that users, by posting new contents, are continuously updating and enriching the apps' content, thus delivering new elements that are able to attract the users' attention. In a similar vein, the likes received by posts or photos published on Facebook or Instagram might incentivise the users in remaining on the app, and improve its performances.[646] Therefore a platform, in the end, provides only an attractive environment for users, but it does not create contents, which, instead, are provided by the users themselves, who are the very 'moving force' of the platform. Moreover, whilst users are reciprocally creating and watching the contents made available on the platform, the latter earns huge profits from advertisers.[647] This

[645] Autorité de la Concurrence, *Google*, cit., point 363.
[646] Moreover, also these likes give the platform a very important insight into what the users may like or dislike most, which then is very important to provide personalised ads. See A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 206. It is also worth underlining how studies have reported that the 'likes race' might impact people's feelings (by generating, *inter alia*, anxiety or satisfaction), thus making a part of our personal life reliant on what we see or achieve (in term of likes) in the platform, which means making us partly 'dependent' on them (200-201).
[647] This is evident not only in the Facebook environment, but also in Google's YouTube, where users post their videos, thus keeping other users on the platforms, and Google earns revenues from ads

allows platforms offering products for free.[648] In fact, if you do not pay for a product, it is plausible that *you become the product*.[649]

This concept has been also addressed by the OECD, which defined this practice as deceptive, with the potential negative consequence of making consumers pay more than in case they would have been fully informed.[650] Also the European Commission, in the *Google Search* decision, defined Google's claim that it offers its search products for free as misleading. Therefore, the Commission affirmed that *while users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query*.[651]

However, not only the platforms themselves are designed to capture our attention. In fact, also the various apps are often designed to attract us the most, gather information about us and sell them to the platform, which then earns from advertisers. It is in this scenario that the interesting twofold relationship between the platform and the relevant app developers is at stake. Indeed, the platform, for developers, can represent success or failure. Success can derive from the acquisition of the app by the platform, as happened, for instance, to Waze or Fitbit, both acquired by Google, but success can come also from a sort of alliance with the platform. It results evident that app developers are not in the same position of the platforms, but they are dependent on them. In a scenario where app developers are facing a fierce competition among them (especially if they provide contents for free), the apparently salvific hand of the platform might come and help the small

placed at the beginning or during a video. In order to understand the unbalance between the time we spend (or, at a certain extent, lose) on the platforms and their profits, it is sufficient to mention that Facebook earns yearly about 67 billion dollars in net digital advertising, whilst Google registered earnings around 104 billion dollars (Net digital advertising revenue of major digital ad-selling companies worldwide in 2019, available at https://www.statista.com/statistics/1202672/digital-ad-revenue-ad-selling-companies-worldwide/, accessed 8 June 2021).

[648] M. Yglesias, *One paper by Nobel Prize winner Jean Tirole that every internet user should know*, Vox, 13 October 2014, available at https://www.vox.com/2014/10/13/6968423/jean-tirole-platform-competition (accessed 1 June 2021).

[649] S. Goodson, *If You're Not Paying For It, You Become The Product*, Forbes, 5 March 2012, available at https://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/?sh=7cf855c35d6e (accessed 1 June 2021).

[650] OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 29-30 November 2016, 25, available at https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf (accessed 30 June 2021).

[651] European Commission, *Google Search (Shopping)*, cit., point 320.

app developers, which might be provided the opportunity to join the advertising network of the platform.[652] However, this help is not for free, and the app developer must agree to exploit a lot of users' data and provide them to the platform.[653] This lies at the foundation of the so-called *frenemy* relationship between platforms and app developers.[654] In fact, in case of noncompliance with the platform's *dicta*, the gatekeeper may exclude the app from its app store (which likely means the relevant app's exit from the market). Moreover, it can acquire the firm developing a small interesting app in case it represents a competitive threat for the platform or it can simply cease the collaboration with the app, for different reasons.[655]

At this point is worth highlighting the other dynamic that takes place behind the scenes in the platform market, which is the sale of data to the advertisers. Of course, as we have already explained, the data gathered and then sold by the platforms are particularly precious for advertisers because they allow them to target users with behavioural advertisements. Indeed, knowing which products a person needs or love, where s/he wants to travel to and what kind of trip s/he can afford, in which state s/he is (big tech can also know with a certain accuracy when a girl is pregnant[656]) is definitely a treasure for advertisers, but in order to get this information they need to pass through the platforms' gate. Moreover, advertisers and companies are at a certain extent obliged to rely on the platforms' services in order to access this data, because if they do not obtain access to this 'informative heritage', their competitors will do, thus rendering for every market player the reliance on platforms a sort of compulsory exercise while running their business. In this sense, the Australian Competition & Consumer Commission (ACCC)'s Chair noted that *digital platforms are […] unavoidable business partners for many*

[652] *Ibidem*, 204. The dependency of small app developers on big tech firms is analysed also by M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 209.
[653] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 204.
[654] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 293-294.
[655] *Ibidem*, 214. A telling example has been reported by the Authors about a racing app developed by the small start-up Tiny Labs. This developer was first awarded with the 'top developer' badge by Google (although the mentioned app extracted a great quantity of data from kids) but, after a lawsuit being filed in New Mexico against Tiny Lab and Google, the developer's account was closed, and its apps were removed from Google Play Store (194, 224). This because, after having been useful for Google, they turned to be inconvenient. But is this demonstration of strength by Google an example of a healthy and competitive environment? Of course not.
[656] A. Ezrachi and M.E. Stucke, *Virtual Competition*, cit., 92-93.

Australian businesses. Google and Facebook perform a critical role in enabling businesses, including online news media businesses, to reach consumers.[657] As results evident, almost every business or advertiser needs to use the platforms' services and this need means dependence, generated by the excessive market power held by tech giants. This position of weakness of market operators vis-à-vis platforms is well represented by the percentage the platforms retain as fees for their services. Establishing an exact percentage is a difficult exercise, however the French Autorité de la Concurrence reported that around 60 percent of the advertising spending flows to the platforms and other intermediaries.[658] In a similar vein, the Australian ACCC Preliminary Report on platforms outlines an experiment conducted in 2016 by The Guardian UK, which purchased programmatic advertising for its own website. The result has been surprising, with The Guardian receiving *less than 30 pence in the pound*.[659] In addition, the same Preliminary Report highlights that in 2018 the head of digital for Duracell *stated that 'at worst' 20 per cent of its initial ad spend in 2017 may have reached consumers as effective media*.[660] However, Google sustains that it passes around 70 percent of revenues to publishers, whilst other studies reported that approximately between 52 and 63 percent of revenue goes to publishers.[661] In any case, it is evident that platforms earn a lion share in the online advertising market due to their powerful position, which, according to Ezrachi and Stucke, grants them the role of 'auctioneer' in the bidding process that occur for the information gathered by the platforms.[662] Precisely on this point, EU Executive Vice-President Vestager, while introducing

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[657] Australian Competition & Consumer Commission, *ACCC releases preliminary report into Google, Facebook and Australian news and advertising*, 10 December 2018, available at https://www.accc.gov.au/media-release/accc-releases-preliminary-report-into-google-facebook-and-australian-news-and-advertising (accessed 8 June 2021).

[658] Autorité de la Concurrence, *Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet*, point 82, available at https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//18a03.pdf (accessed 8 June 2021). The English version of this Opinion is available at https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2019-10/avis18a03_en_.pdf (accessed 8 June 2021).

[659] Australian Competition & Consumer Commission, *Digital Platforms Inquiry. Preliminary Report*, December 2018, 86, available at https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf (accessed 8 June 2021).

[660] *Ibidem*.

[661] *Ibidem*, 85-86.

[662] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 208.

the just launched investigation into Google in the online advertising technology sector on 22 June 2021, brilliantly summarised what we have described until now. Indeed, she stated that *online advertising services are at the heart of how Google and publishers monetise their online services. Google collects data to be used for targeted advertising purposes, it sells advertising space and also acts as an online advertising intermediary. So Google is present at almost all levels of the supply chain for online display advertising*.[663]

About this profile, it is also necessary to report that dominant platforms are able to gather users' data in a panoply of ways and users have little or any defences against this practice. For instance, Google, of course, collect data when we are searching on its search engine and using its apps (such as Gmail or YouTube), but it gathers data about us also when we are surfing the internet in non-Google pages through the Chrome browser or when we are using an Android device.[664] This activity is often carried out by means of tools such as cookies, which are text files gathering our preferences and information about the user active on a website, such as the pages s/he visited, thus allowing profiling.[665] However, this sounds quite normal, and a hypothetical user may think that browsing in the 'incognito' safe mode could protect her/him from data gathering, but as reported by various studies, this is not true.[666] Moreover, every webpage using advertising services provided by Google (which, as stated by the ACCC Preliminary Report, according to Google, are more than 2 million sites, reaching 90 percent of users worldwide) tracks the users independently of the browser they are using,[667] and ad blockers may in any case be

[663] European Commission, *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, 22 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143 (accessed 22 June 2021).
[664] Australian Competition & Consumer Commission, *Digital Platforms Inquiry. Preliminary Report*, cit., 48; *Autorité de la Concurrence, Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet*, cit., point 129.
[665] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 13.
[666] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 206.
[667] Australian Competition & Consumer Commission, *Digital Platforms Inquiry. Preliminary Report*, cit., 48; Autorité de la Concurrence, *Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet*, cit., point 130. In particular, the latter publication states that *when a user visits a third-party website that use Google advertising services, social modules (such as the +1 button) or analytics tools (Google Analytics), the user's browser automatically sends Google information that is similar to the information that Google saves in its own servers when the user visits its sites*.

eluded by the main platform.[668] Moreover, not only Google collects information from us simply by 'reading' our browsing history. Facebook, as well, can gather data when we are surfing the internet in pages where a Facebook 'like' or 'share' button is present, as clearly reported in the Bundeskartellamt 2019 decision against the social network (which will better analysed below). Firms which extract our data – especially about things we want and about which kind of user and consumer we are – might target us not only with personalised ads, but also with tailor-made prices ('price discrimination'), which are not based – as normally occurs in business transactions – on a negotiation, but they are simply generated by an algorithm which processed our data and understood what we want and how much we are willing to pay for it.[669] In addition, the algorithm has also the ability to continuously adapt the price to changing situations.[670] What is worrying here is that, as consumers, we are hooked by something that is happening without our knowledge and at the sole purpose of making us buy something. Of course, all these dynamics occur at the cost of our privacy and contractual freedom.

2.2.1. The impact on privacy

Among the major concerns related to digitalisation we can list the use that tech firms make of users' personal data. Indeed, data represent the *fuel* of digital firms, or the *currency* of 'digital transactions'.[671] According to Balkin, this constitutes the

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[668] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 207; Autorité de la Concurrence, *Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet*, cit., point 74. The latter report shows that when users use ad blockers can generate losses around 30 percent to players in the online advertising sector. However, it is reported that big firms, such as Google and Facebook, can negotiate with ad blockers to have their ads authorised or they simply have the resources to find ways to circumvent ad blockers.

[669] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 25; A. Ezrachi and M.E. Stucke, *Virtual Competition*, cit., 212.

[670] *Ibidem*.

[671] On this topic, the European Commission Executive Vice-President Margrethe Vestager referred to *big data as being the new currency of the internet*, see *Hearing of Commissioner-Designate Margrethe Vestager in front of The Committee on Economic and Monetary Affairs of the European Parliament*, 2 October 2014, 36, available at https://www.europarl.europa.eu/hearings-2014/resources/library/media/20141022RES75845/20141022RES75845.pdf (accessed 26 June 2021). In a similar vein, the European Data Protection Supervisor (EDPS) stated that *it is now commonplace for personal information to be compared to a currency used to gain access to online services*, see EDPS, Opinion 8/2016, *EDPS Opinion on coherent enforcement of fundamental rights in the age of big data*, 23 September 2016, 6, available at

grand bargain of digital economy, which is *free communications services in exchange for pervasive data collection and analysis*.[672] This dynamic, noteworthily, has also been 'officially' recognised at the European level by the recent Directive 2019/770 on the supply of digital contents and digital services.[673] In fact, its article 3 provides that this act is applicable also *where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader*.[674]

Just in order to understand the paramount role played by data, we can simply consider that, according to the *Indagine conoscitiva sui big data* conducted by the Italian AGCM, together with both the Italian telecommunication and data protection regulators, in a single minute 2.3 million searches are submitted on Google, 3 million 'likes' and 3 million shares are generated on Facebook and 2.7 million downloads occur on YouTube.[675] It is worth noting that a McKinsey report in 2016 outlined that the flow of data now generates more economic value than the

https://edps.europa.eu/sites/default/files/publication/16-09-23_bigdata_opinion_en.pdf (accessed 26 June 2021). See also the Report by the Autorità Garante della Concorrenza e del Mercato (together with Autorità per le Garanzie nelle Comunicazioni and Garante per la Protezione dei Dati Personali), *Indagine conoscitiva sui big data*, February 2020, 89, available at https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf (accessed 19 May 2021). From a judiciary standpoint, it is worth mentioning the decisions issued in Germany by the Bundesgerichtshof (decision 23 June 2020, KVR 69/19, points 59-63) in the context of the German *Facebook* case (a courtesy English translation of the decision is available at https://www.d-kart.de/wp-content/uploads/2021/06/BGH-Beschluss-v.-23.06.2020_Englisch.pdf, accessed 15 July 2021) and in Italy by the TAR Lazio (decision 10 January 2020, no. 261, point 6) and then by the Consiglio di Stato (decision 29 March 2021, no. 2630, point 7) ruling on the Italian *Facebook* case, where it was established that personal data are an asset subject of economic exploitation, thus being used as consideration in a transaction (as done by Facebook, whose defence was rejected both in first instance and in appeal). See also M. Wasastjerna, Competition, *Data and Privacy in the Digital Economy*, cit., 172-173; K. Wiedemann, *A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v. Facebook (Case KVR 69/19)*, International Review of Intellectual Property and Competition Law, 2020, 51, 1171; B. Mäihäniemi, *Competition Law and Big Data. Imposing Access to Information in Digital Markets*, Edward Elgar, 2020, 37; S.Y. Esayas, *Privacy-as-a-quality parameter of competition*, in B. Lundqvist and M.S. Gal (Eds.), *Competition Law for the Digital Economy*, Edward Elgar, 2019, 128.

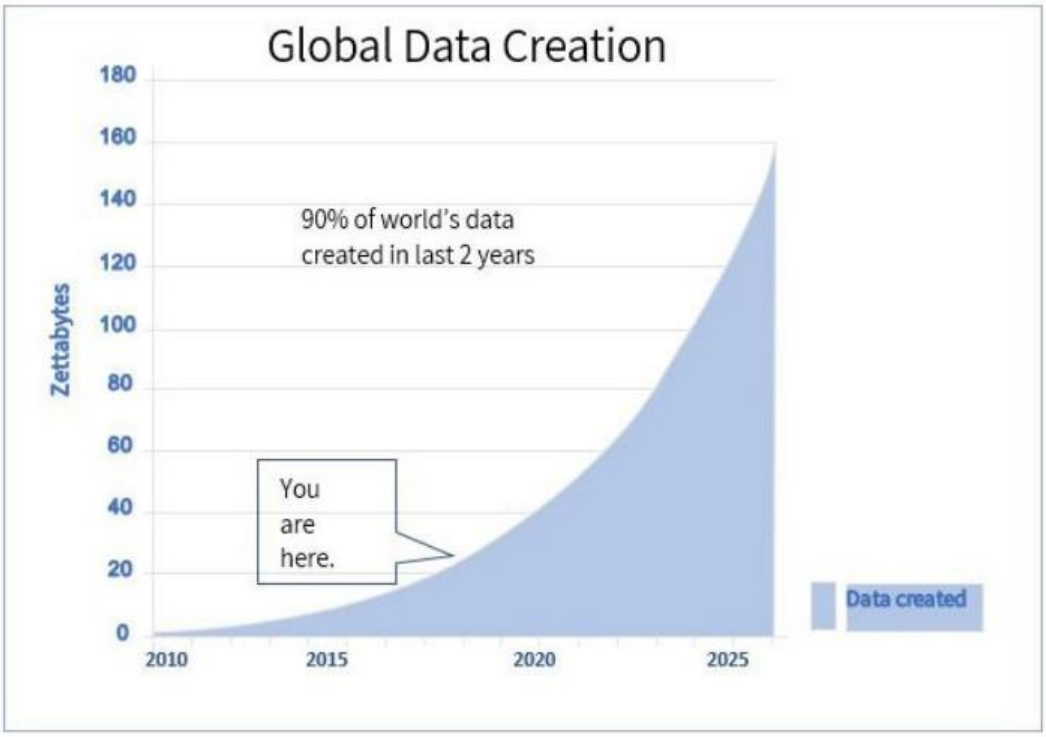
[672] J.M. Balkin, *Fixing Social Media's Grand Bargain*, Aegis Series Paper no. 1814, 2018, 1, available at https://www.hoover.org/sites/default/files/research/docs/balkin_webreadypdf.pdf (accessed 1 November 2021).

[673] Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, published in the OJ of the EU 22 May 2019, L 136/1.

[674] *Ibidem*, Article 3, paragraph 1.

[675] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 6.

global goods trade.[676] Moreover, the volume of data created worldwide is expected to continuously increase at an exponential rate, thus reaching a level around five-times higher than the present one.[677] This phenomenon is well shown by the following graph:[678]



Digital market players collect and process huge quantities of data, including also personal information,[679] which, in the context we are analysing, may represent the

[676] J. Manyika, S. Lund, J. Bughin, J. Woetzel, K. Stamenov, D. Dhingra, McKinsey Global Institute, *Digital globalization: The new era of global flows*, 24 February 2016, available at https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-globalization-the-new-era-of-global-flows# (accessed 30 June 2021). See also M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy*, cit., 37-38.

[677] T. Wheeler, *The Root of the Matter: Data and Duty. Rules for the New Digital Economy Should Look to Old Common Law Traditions*, The Shorenstein Center on Media, Politics and Public Policy, November 2018, 2, available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/Root%20of%20the%20Matter%20Wheeler.pdf (accessed 23 June 2021).

[678] *Ibidem*.

[679] *Ibidem*, 7. European Parliament, Resolution of 14 March 2017 on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law enforcement, published in the OJ of the EU 25 July 2018, no. C 263/82, point A. According to Article 4, point 1, of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR),

most valuable dataset. After their collection, big data *are subject to automatic processing by computer algorithms and advanced data-processing techniques using both stored and streamed data in order to generate certain correlations, trends and patterns (big data analytics)*.[680] This, as well summarised by the European Parliament's lines reported, allows players such as Google or Facebook to extract and organise information about people in order to sell more detailed information in the 'auctions' occurring behind the scenes on the web, as we have described above. These features, which are distinctive of big data, can be summarised by the so-called 'four Vs': the 'volume', which refers to the huge dimension of data gathered and processed; the 'velocity' at which such data are treated; the 'variety' of data available, which can be also of aggregate nature; and the 'value' of these data (especially the value that can be extracted from them when treated).[681]

Extraction of knowledge from big data may occur through three main phases, which are 1. Gathering, articulated in generation, acquisition and memorisation; 2. Processing, which comprises extraction, integration and analysis activities and 3. Interpretation and use.[682] This flow can be better understood through the following scheme:[683]

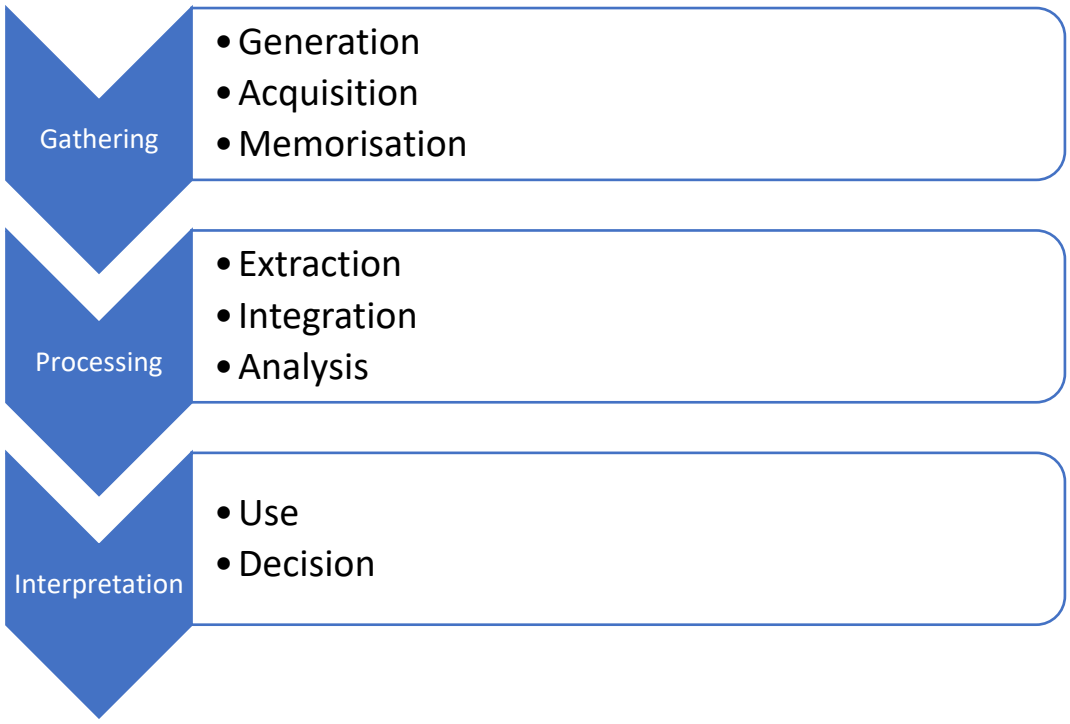
published in the OJ of the EU 4 May 2016, no. L 119/1, *'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*.

[680] European Parliament, Resolution of 14 March 2017 on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law enforcement, point A. Moreover, according to Article 4, point 2, of the GDPR, *'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction erasure or destruction*. See also M. Wasastjerna, Competition, *Data and Privacy in the Digital Economy*, cit., 37.

[681] A. Ezrachi and M.E. Stucke, *Virtual Competition*, cit., 15; M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 16-28; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy*, cit., 36; Autorité de la Concurrence and Bundeskartellamt, *Competition Law and Data*, cit., 4; AGCM and Others, *Indagine conoscitiva sui Big Data*, cit., 8; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy*, cit., 36.

[682] AGCM and Others, *Indagine conoscitiva sui Big Data*, cit., 8.

[683] Free adjustment and translation by the Author from AGCM and Others, *Indagine conoscitiva sui Big Data*, cit., 9, Figura 3 – La filiera dei *Big Data*.



These activities may involve personal information regarding the relevant services' users. In this case, the rules on personal data protection come into play and, in the particular context we are scrutinising, they shall operate complementarily with competition rules. In particular, in this scenario, EU competition provisions shall be read in conjunction with Regulation 679/2016, the General Data Protection Regulation (GDPR). A different discourse shall be made for the U.S. environment, where an organic piece of legislation on personal data protection has not been enacted yet. However, thanks to the initiative of real estate developer Alastair Mactaggart, in 2018 California (surprisingly, the home State of Google, Facebook and the other tech giants) passed the California Consumer Privacy Act.[684] Although this bill shall be considered less effective than the new EU Regulation, it has of course the merit of having paved the way for the debate around privacy protection

[684] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 286-287.

in the United States. Currently, also Virginia, Colorado and Utah have enacted consumer privacy laws.[685]

2.2.2. Data protection rules and their possible interaction with competition law

Among its main features, the GDPR's structure – for our purpose – shall be deemed focused on the concepts of 'consent' and 'data portability'. Having regard to the former, Article 6, paragraph 1, point (a), GDPR provides that data processing is deemed lawful if, among others, *the data subject has given consent to the processing of his or her personal data for one or more specific purposes*. The subsequent article 7 GDPR better specifies the conditions for consent. In particular, if consent is provided in a written document involving also other matters, it shall be given in a manner which is clearly distinguishable from the other issues. Then, a right of withdrawal from her/his consent is recognised in favour of the data subject. However, the most relevant provision is contained in paragraph 4, where it is stated that *when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract*.

With reference to the other main GDPR's tool listed above, it is first worth noting that the Regulation, in addition to the right to data portability, grants other important rights to data subjects, such as the right to rectification (Article 16), the right to erasure or 'right to be forgotten' (Article 17) and the right to restriction of processing (Article 18). The right to data portability is enucleated by article 20 GDPR, which provides that where the data processing is based on consent and it is carried out by automated means, *the data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to*

[685] Utah Joins California, Colorado, and Virginia in Enacting Consumer Privacy Law, O'Melveny, 29 March 2022, available at https://www.omm.com/resources/alerts-and-publications/alerts/utah-joins-california-colorado-virginia-enacting-consumer-privacy-law/ (accessed 24 April 2022).

which the personal data have been provided (paragraph 1). However, for our purposes, the following paragraph 2 may be even more interesting. In fact, it states that *in exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible*.

However, consent represents a weak guarantee for consumers, whilst the right to data portability does not represent a tool that necessarily fosters competition among the various platforms, as well. Indeed, consumers may agree with their data's treatment for different reasons. One may be represented by the impossibility to use the relevant service without giving their consent, as found by the Bundeskartellamt in the *Facebook* case. This kind of practices might be easily adopted by firms acting in a 'gatekeeper' role, which may exploit their position as monopolies in order not to give valid alternatives to users. In fact, if users do not consent with Facebook's conditions, can they switch to another equally valuable social network? Are users able (especially if they use and Android device) to found equally valid 'workstation' services, such as Gmail, if they do not agree with Google's terms? It is consequential from the above that an effective protection of personal data, when digital gatekeepers are involved, passes necessarily through the complementary application of competition rules, needed in order to curb the high degree of market power that these firms enjoy. Moreover, it is also essential to ask whether the privacy consent we generally provide – notwithstanding if we are dealing with a tech giant or not – is really free and properly weighed, as subjects are usually asked to give their consent when they are looking forward to using a service or buying some item. In the end, users *must* give their consent to use the service. In light of the above, it results evident that reading privacy policies might prove to be a mere formal and useless exercise, as well as impossible for almost all people. Researchers have found that on average a privacy policy from a top website is 2,514 words long. This means that at a standard reading pace, reading the privacy policies of all the websites visited by an average American user would take 76 eight-hour workdays, amounting at about four months.[686] As well pointed out by Wheeler, *these so-called*

[686] T. Wheeler, *The Root of the Matter: Data and Duty*, cit., 7-8.

"protections" can be – and are – changed at will by the companies. Relying on so-called "privacy policies" for protection is like hiring the cat burglar to guard the jewels.[687] In like of the above, as the same Author noted, these privacy policies appear more like a *permission to violate our privacy*.[688] Stucke an Grunes also sustained that in this field competition does not provide a better outcome, but a worse one, because firms compete also on the drafting of privacy policies, thus rendering them less clear.[689] Also the EDPS sustained that *relatively few companies in the digital economy have detected financial advantage in enhancing the privacy of their offerings*.[690]

Additionally, users can suffer from information asymmetries about the real use that the company will make of their data. In this sense, given the unexplored nature of the big data issue, innovative solutions have been proposed,[691] like the so-called 'dynamic consent' used with regard to biobanks: After having received a general terms notice, the user gives consent about the general use that can be made of her/his data. Then, when the specific purpose for the use of data is established, the user will receive a more detailed notice and s/he will renew her/his consent on the basis of the detailed information received.[692]

Having regard to the right to data portability, this represents without any doubt a positive innovation, from both a pure privacy perspective and from a competitive

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[687] *Ibidem*, 8.
[688] *Ibidem*, 7. See also A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 217.
[689] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 56. On 'privacy competition' see also M.E. Stucke, *Should We Be Concerned About Data-opolies?*, Georgetown Law Technology Review, 2018, 2, 275, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3224575_code594071.pdf?abstractid=3144045&mirid=1 (accessed 30 April 2022); M.E. Stucke, *Breaking Away. How To Regain Control Over Our Data*, Privacy, and Autonomy, Oxford University Press, 2022.
[690] EDPS, *Privacy and competitiveness in the age of big data*, cit., point 14.
[691] On this point see Article 29 Data Protection Working Party, *Statement on Statement of the WP29 on the impact of the development of big data on the protection of individuals with regard to the processing of their personal data in the EU*, 16 September 2014, available at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp221_en.pdf (accessed 24 June 2021). Here, the WP29 stated that *the challenges of big data might require innovative thinking on how some of these and other key data protection principles are applied in practice* (p. 2).
[692] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 84. See also Council of Europe, *Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data*, 23 January 2017, available at https://rm.coe.int/16806ebe7a (accessed 24 June 2021).

one.[693] However, this right grants data portability towards where? Here the reasoning made above about lock-in effects generated on users by network effects in tipping markets stands out. In fact, if Facebook is the only social network where a person can find all or the majority of friends, where does s/he transfer her/his data?[694] And this discourse can be repeated with reference to every service run by a 'gatekeeper'.[695]

The response, also in this case, lies in the need for antitrust intervention, justified by the market power enjoyed by players dominating digital markets. Indeed, as noted by Wheeler, *the five most valuable companies in the world know, or profit by enabling others to know, specific information about each of us. Having aggregated this information, the data is hoarded to create a bottleneck that maximizes its value by controlling its usage*.[696] Indeed, only these companies, not causally referred to as 'data-opolies'[697] can gather, process and control such a huge amount of data about us. In this sense, the German Bundeskartellamt's head, Andreas Mundt, pointed out that big tech *knows you better than your wife*.[698]

Gatekeepers have the control of data, the control over data analytics and they are the most efficient players in the dynamics required by the data economy. It could be argued that they gained this position thanks to their merits, and we are not here

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[693] Although, as noted by the report from the European Commission, *Competition Policy for the Digital Era*, cit., 82, the right to data portability is not applicable to 'inferred data', which are defined as data *obtained by transforming in a non-trivial manner volunteered and/or observed data while still related to a specific individual or machine* (p. 25). Moreover, according to the report, *inferring information from volunteered or observed data is an essential part of competition* (p. 25).

[694] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 291-292.

[695] Furthermore, from a practical standpoint, the Italian AGCM has found that only one user out of ten is aware of her/his right to data portability and the low interest in making use of the right to data portability (41.1 percent) is caused by a sort of lock-in effect, *i.e.* low propension at using other platforms. See Autorità Garante della Concorrenza e del Mercato, *Indagine conoscitiva sui big data. Analisi della propensione degli utenti online a consentire l'uso dei propri dati a fronte dell'erogazione di servizi. Primi risultati*, 3, available at https://www.agcm.it/dotcmsDOC/allegati-news/IC53%20-%20Survey%20primi%20risultati.pdf (accessed 24 June 2021).

[696] T. Wheeler, *The Root of the Matter: Data and Duty*, cit., 16.

[697] M.E. Stucke, *Should We Be Concerned About Data-opolies?*, Georgetown Law Technology Review, 2018, 2, 275.

[698] A. Satariano, *Big Tech 'Knows You Better Than Your Wife.' He Plans to Rein It In*, The New York Times, 7 July 2019, available at https://www.nytimes.com/2019/07/07/business/facebook-google-antitrust-germany.html (accessed 24 June 2021). The article also reports another interesting quotation from President Mundt about tech giants' business model. He tellingly pointed out that *the business model is to gather and process data, full stop. There is nothing else. If they don't have data, they can have 10,000 very intelligent engineers who tell you what you can make out of data, but without the data you don't make anything*.

to question the soundness of their strategy, whilst others sustains that it is just the structure of digital markets that allow a handful of firms (the leader of each digital market, *i.e.* ecommerce, social networking, etc.) to reach a dominant position, that is these markets' inner feature.[699] Indeed, all the data chain requires high investments in terms of technology, and it is a market characterised by high innovation rates (fuelled by investments).[700] Moreover, when a firm emerges – generally thanks to its 'first-mover' action[701] when that market has not been established yet – as leader in that particular digital market it establishes a sort of virtuous cycle, which confers it a status that can be compared to a natural monopoly.[702] Indeed, the firm, as we saw, can act as gatekeeper in its relevant market, and entry from other firms is in practice impossible due to the high investments needed and, moreover, by the lack of the data infrastructure and collection needed in order to compete with the incumbent. Consequently, entry in these markets is prevented by very strong entry barriers and competition – for the market – is not 'one click away', as sustained by Google.[703] At this purpose, also the OECD noted that *platform competition often leads to a winner-takes-all outcome in which monopoly is the nearly inevitable outcome of market success*.[704] Moreover, the same Organisation for Economic Co-operation and Development sustained that *digital markets are often characterised by strong network effects and economies of scale, which are largely responsible for the winner-takes-all*

[699] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 76.
[700] *Ibidem*, 73. In this sense it is worth reporting that the report by the European Commission, *Competition Policy for the Digital Era*, cit., 105, has emphasised that *competition is driven by the search for opportunities for profitable investments. Irrespective of dominance, competition law must not kill economic actors' incentives to invest and innovate. In a data-driven economy, this is also true with regard to investments in data collection and processing. Thus, competition law must take the incentive effects into account before imposing a duty to deal, or more specifically a duty to grant access to data. At the same time – in particular if the dominant data holder is a platform – the interest balancing needs to figure in the importance of protecting competition* for *the market*.
[701] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 73. See also B. Mäihäniemi, *Competition Law and Big Data*, cit., 77.
[702] See also M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 163; B. Lundqvist, *Regulating competition in the digital economy*, cit., 3; The tendency of online markets to tip towards a dominant platform is outlined also by J.B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law*, cit., 2. Anyhow, the Author states that the emergence of a dominant platform is not inevitable if control over data and multi-homing are feasible with less switching costs for users.
[703] B. Mullins, R. Winkler, B. Kendall, *Inside the U.S. Antitrust Probe of Google*, The Wall Street Journal, 19 March 2015, available at https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274 (accessed 23 June 2021).
[704] OECD, *Supporting Investments in Knowledge Capital, Growth and Innovation*, 2013, 170.

outcomes.[705] This may occur because the firms which are able to collect the greatest quantity of data can improve their self-learning algorithm, extract value from the data collected and consequently investing profits in expanding their network, thus reaching the position of 'super-platforms', which can exercise a very high degree of economic dependence on other firms.[706]

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[705] *Ibidem*.

[706] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 28. In order to exemplifying, think about a new firm which want to enter the market of search networks, dominated by Google. How could it succeed? Remember also that training the search algorithm through a learning-by-doing process is essential to provide refined results. Moreover, think about the fact that status quo biases may prevent users from switching from Google. In addition, think also about the fact that if Google may consider that this firm represents a potential threat to its dominance it can exclude it from the Google Play Store on Android devices. In the end, although entry might be possible for a new firm, it is likely impossible that this firm will become dominant at the expense of a 'gatekeeper'. Even if this firm may focus its business model on something the dominant firm does not provide, such as privacy, it is very unlikely that it can turn to gain a relevant market share. This is the case, for instance, of the privacy-friendly search engine DuckDuckGo, which entered the market by promoting the protection of personal data (M.E. Stucke and A. Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, cit., 101) and which, if all consumers would have been rational (as assumed by Neoclassical economic thinking), would have rapidly displaced Google, but it did not. And the reasons are known: Entry barriers and data bottleneck (the new search engine does not rely on a search algorithm well trained as Google's one and other factors such as status quo bias). As a result, this privacy-compliant search engine reached the 2.44 percent of market share in the U.S. (however increasing) and the 0.52 percent in Europe (0.88 percent in Germany, 0.7 percent in the UK and 0.49 percent in France, Search engine market share held by DuckDuckGo from July 2019 to February 2021, by region, available at https://www.statista.com/statistics/1220046/duckduckgo-search-engine-market-share-by-region/ (accessed 23 June 2021)). This represents an evident example of the so-called 'privacy paradox' (P.A. Norberg, D.R. Horne, D.A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors*, The Journal of Consumer Affairs, 2007, 41, 1, 100. However, according to D.J. Solove, *The Myth of the Privacy Paradox*, The George Washington Law Review, 2021, 89, 1, 1, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3775817_code249137.pdf?abstractid=3536265&mirid=1 (accessed 26 June 2021) the privacy paradox is a myth based on faulty logic. In particular, he argues that some thinkers use this argument for the purpose of weakening privacy protection rules, sustaining that the behaviour of people is the best metric for understanding how much they care about privacy, thus leading to the conclusion that if they sell their data for nothing or for a nominal value, they do not care a lot about privacy. On the contrary, he affirmed that studies based on behavioural distortion in consumers' choice refer to the particular situation in which the experiment is carried out. All in all, he correctly suggests that also in this case the solution is not giving more power to people in the management of their data (see what we observed about consent), but that it is necessary a regulation of the whole mechanism involving data gathering, processing and transfer. In this sense, we think that what we are sustaining about the role of competition law in regulating the processes of the data economy might be considered in line with Professor Solove's approach. See also A. Ezrachi and V.H.S.E. Robertson, *Competition, Market Power and Third-Party Tracking*, cit., 13) which characterises digital markets. We are referring to the situation in which consumers sustain to care a lot about their privacy, but then, usually because of the described network effects and lock-ins, they easily provide their data in exchange of free services (According to P.A. Norberg, D.R. Horne, D.A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors*, cit., 101, the *privacy paradox* is the *discrepancy between individuals' intentions to protect their own privacy and how they behave in the marketplace*).

This sort of 'winner takes all' feature characterising the 'data-opolies' may not only regard their main market, but also translate into adjacent or however different markets, as they can enter the latter with a sort of competitive advantage.[707] This can occur, for instance, in a plethora of sectors, although examples have often been made about the insurance market.[708] Indeed, in this field, such operators may take advantage of their IoT services and of the data they possess about users (data gathered when a person drives, maybe through services like Android Auto, Google Maps, Waze, connected cars, but also health data collected via smartwatch sensors and apps). Indeed, as brilliantly noted by Valletti, Bourreau, Caffarra and Others about the Google/Fitbit merger, *what is unique about this deal is that the Fitbit datastream would be bolted on top of Google's own "data firehouse" and unrivalled stock of cumulated data on multiple aspect of users' profiles. The interaction of health and non-health data can be used to make enormous profits in health and insurance markets, directly (to the extent that Google offers these services itself) or indirectly (to the extent that it sells these insights and analytics to actors in these markets). Google's dominance in non-health data, combined with health data, will enable them to uniquely identify good risks and extract surplus from them (e.g. offering them only slightly lower prices), causing higher prices or lack of cover for bad risks and, in the extreme case, market unravelling over time.*[709] In the same vein, the Financial Stability Board (FSB) – with particular reference to

[707] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 79-80; H.K. Schmidt, *Taming the shrew: is there a need for a new market power definition for the digital economy?*, in B. Lundqvist and M.S. Gal (Eds.), *Competition Law for the Digital Economy*, cit., 35-36.
[708] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 79-80.
[709] M. Bourreau, C. Caffarra, Z. Chen, C. Choe, G. S. Crawford, T. Duso, C. Genakos, P. Heidhues, M. Peitz, T. Rønde, M. Schnitzer, N. Schutz, M. Sovinsky, G. Spagnolo, O. Toivanen, T. Valletti, T. Vergé, *Google/Fitbit will monetise health data and harm consumers*, CEPR Policy Insight no. 107, 2020, available at https://cepr.org/sites/default/files/policy_insights/PolicyInsight107.pdf (accessed 24 June 2021). In the same vein, about the Google/Fitbit merger, see The European Consumer Organisation (BEUC), *Google-Fitbit merger. Competition concerns and harms to consumers*, May 2020, available at https://www.beuc.eu/publications/beuc-x-2020-035_google-fitbit_merger_competition_concerns_and_harms_to_consumers.pdf (accessed 24 June 2021). Here, the BEUC objected that *although Google is not yet as powerful in digital health as it is in other digital markets, it is massively expanding its digital and other health business (including insurance) and is considered to be "already the largest provider of healthcare information". Google has agreements to collect vast amounts of patient health data from healthcare providers, including public health systems such as the NHS in the UK. It is conceivable that Google's main driver for the proposed transaction is large scale expansion into the $8.7 trillion healthcare market through its market strength in data and data analytics* (p. 8). Moreover, the BEUC noted that *the value of health data from smartwatches/wearables is demonstrated by public authorities using fitness apps on these devices to help monitor and predict the spread and containment of COVID-19 infections* (p. 8).

the financial sector – objected that *Big Tech firms can achieve scale very quickly in financial services by leveraging several comparative advantages. These include their large established customer networks, brand recognition, proprietary customer data and state-of-the-art technology*.[710] In light of the reported statements, it results evident how the market power gained by big tech companies in their main market – when they are tipped in the gatekeeper's favour – may be leveraged also in other markets, thus leading to a sort of unfair competitive pressure against operators active in these markets (which can be soon dominated by the gatekeeper after its entry).

An alternative approach to data portability consists in sharing the algorithmic learning of big gatekeepers instead of the mere data.[711] In particular, it can be sustained that if data are shared, as also suggested above, big techs' position would be affected only at a little extent, because data are only a face of the medal, and the other is represented by the algorithm processing these data. If big techs maintain their algorithms' inner advantage (due to the self-learning processes explained above), other companies will not reach big techs' refinement in data processing, and they will always remain a step behind the biggest market players. Conversely, if the algorithm is shared, also other companies would compete on the same level.[712] Anyhow, although we really appreciate the theoretical consistency of such a theory, we cast some doubts on its feasibility, with a particular reference also on incentives to innovate. Of course, Google and Facebook have invested a lot in creating, improving, and refining their algorithms and sharing this technology appears a little incompatible with incentives to innovation at a first sight, but also, from a larger perspective, with the broader liberal market economy concept. It appears more like an unlawful 'expropriation' of the technology – needless to say – created by big

[710] Financial Stability Board, *BigTech in finance. Market developments and potential financial stability implications*, 9 December 2019, 3, available at https://www.fsb.org/wp-content/uploads/P091219-1.pdf (accessed 24 June 2021).
[711] M. Gal and N. Petit, *Radical Restorative Remedies for Digital Markets*, Berkeley Technology Law Journal, forthcoming, 2021, 12-19, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3703089_code163287.pdf?abstractid=3687604&mirid=1 (accessed 3 July 2021).
[712] For the sake of exemplifying by means of a metaphor, if data portability is seen as driving in the same circuit with different F1 cars, algorithmic learning sharing might appear like racing in the same circuit, but also with the same car, and only under the latter condition would emerge who is really the most competitive driver.

tech companies. From a more legal standpoint, the same argument may have regard to intellectual property issues. Indeed, these companies' algorithms are protected by IP rights or trade secrets and ordering a mandatory sharing of this technology may contrast with their rights.[713] Of course, as answered by the Authors in response to this question, proprietary rights might be 'forced' because such algorithms are trained by means of data illegally acquired by digital gatekeepers. But, although we are plainly in favour of a more aggressive antitrust enforcement against big tech companies, have the data at stake really been gathered illicitly? Probably not, because here what we can name the 'consensus paradigm' re-emerges, thus leaving room for the illicitly acquisition argument against the owner's rights only in case the system based on the data subject consensus will be reformed or overcome. And, finally, a last observation about this theory emerges: What about competition after the mandatory algorithmic learning sharing? Probably gatekeepers will re-emerge as dominant also after the compulsory sharing due to the characteristics that they brought them in that position. Or, however, another gatekeeper will emerge, thus having the problem repeated – maybe with a different firm – but not solved.[714]

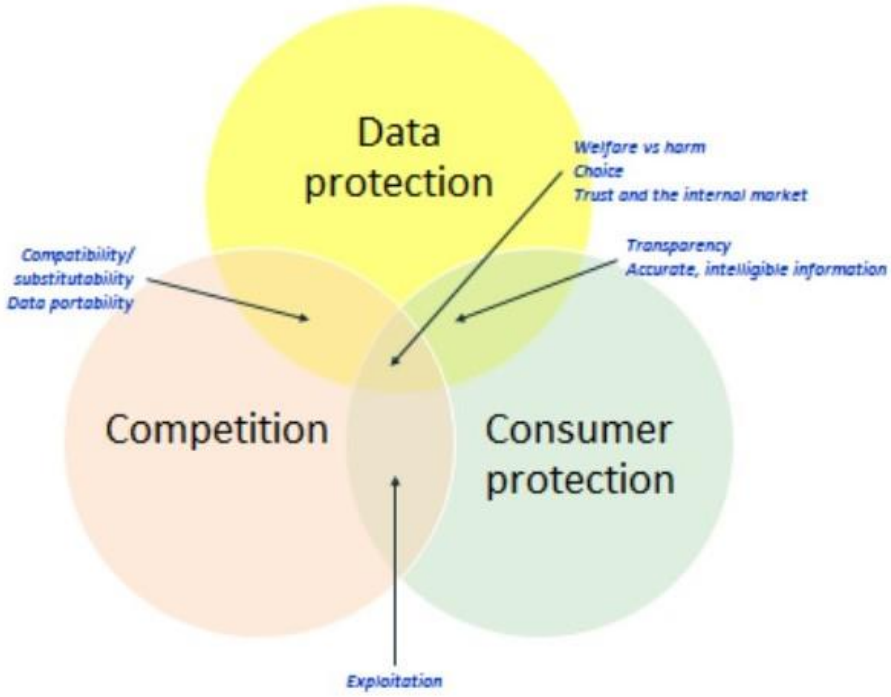
In light of the above, it results clear that privacy represents one of the most important aspects of competition law assessment of conducts occurred in the digital environment. Indeed, as pointed out also by the European Data Protection Supervisor, consumers may consider a more privacy compliant product as a better quality one.[715] In this sense, the parameter of quality becomes central, in respect of

[713] *Ibidem*, 19.

[714] Returning to our F1 metaphor: After a compulsory 'engine' sharing, every team starts the season with the same possibility of winning the world championship. But, after some races or seasons, a dominant team will emerge. At this point what to do? Ordering another sharing? But what about the mentioned incentives to innovate and the competitive process where firms struggle for reaching the best position thanks to their merits? And the F1 metaphor is particularly correct, because after a certain number of years the Federation changes technical regulations in order to level the performances of the various teams, in order to make them start from zero. However, a dominant team always emerges after every regulation change. But if a new dominant team always emerges (and this is factual), are we sure that practically this is the right method to solve the current excessive market power problem?

[715] EDPS, European Data Protection Supervisor (EDPS), preliminary opinion of 26 March 2014, *Privacy and competitiveness in the age of big data*, 33, available at https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf (accessed 19 May 2021). On this interaction see also, *inter alia*, F. Costa-Cabral and O. Lynskey, *Family Ties: The Intersection Between Data Protection and Competition Law*, Common Market Law Review, 2017, 54, 11; O. Lynskey, *At the crossroads of data protection and competition law: time to take stock*, International Data Privacy Law, 2018, 8, 3, 179.

the pure monetary price, which, in this context, is not represented by a currency, but exactly by the amount of personal data that we provide to the dominant gatekeepers. In this sense, according to the same EDPS, *application of competition and consumer protection law can be used as a tool to foster dynamic efficiency in digital markets and to encourage innovation. Recognition by the European authorities of the value of personal information in guidance and key decisions could foster privacy-enhancing services which serve the consumer's interest*.[716] The interaction among competition law, data protection and also consumer law has been brilliantly summarised by the same EDPS by means of the following figure:[717]



The approach suggested above aims at reaching a sort of 'multi tool' assessment of behaviours capable of distorting competition. With specific regard to the interaction between competition and data protection, this appears central in the new investigation just launched by the European Commission on Google in the online advertising technology sector. In fact, in the relevant press release, it is reported

[716] *Ibidem*.
[717] *Ibidem*, 2.

that *the Commission will take into account the need to protect user privacy, in accordance with EU laws in this respect, such as the General Data Protection Regulation (GDPR). Competition law and data protection laws must work hand in hand to ensure that display advertising markets operate on a level playing field in which all market participants protect user privacy in the same manner*.[718] For the sake of pursuing this task, it is worth noting that the inclusion of data protection into the competition assessment of cases can found its legal basis in Article 16 TFEU.[719] The necessity of a joint approach plainly emerges also from the threefold nature (AGCM, AGCOM and Garante per la Protezione dei Dati Personali) of the Italian *Indagine Conoscitiva sui Big Data*. However, to date, the major example of a 'multi tool' application of competition and data protection rules is represented by the *Facebook* decision issued in 2019 by the German Bundeskartellamt, that needs to be better scrutinised.

2.2.2.1. The Bundeskartellamt's Facebook case: Towards a 'multi-tool' enforcement

The decision issued by the Bundeskartellamt against Facebook shall be regarded as a milestone for competition law enforcement in digital markets, for all the aspects it analyses, starting from market definition to the role of competition law into a broader policy context, and until the remedies imposed on Facebook. What is more interesting is also the subsequent ruling by the Bundesgerichtshof, which confirmed the outcome reached by the German Competition Authority, together with some significant refinements.

The decision is mainly focused on the combination of users' data made by Facebook with regard to information gathered on the social network itself, but also on owned apps like Instagram or WhatsApp and third-party websites or apps (where the so-called Facebook Business Tools, which are services offered to developers and businesses, are integrated). In particular, the Bundeskartellamt sustained that

[718] European Commission, *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, cit.
[719] M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy*, cit., 180.

Facebook collected these data and then 'merged' them into the users' Facebook account, without an express users' consent. Of course, this practice raises both data protection and competition law issues. In fact, the whole operation with users' data in absence of their consent is not in line with the GDPR requirements. Additionally, in the data and advertising-driven economy, the merger of such an amount of information (often including very personal details) may also lead to a significant competitive advantage for the firm engaged in this practice while other companies, which cannot benefit from Facebook's (data) size, may suffer a competitive harm.

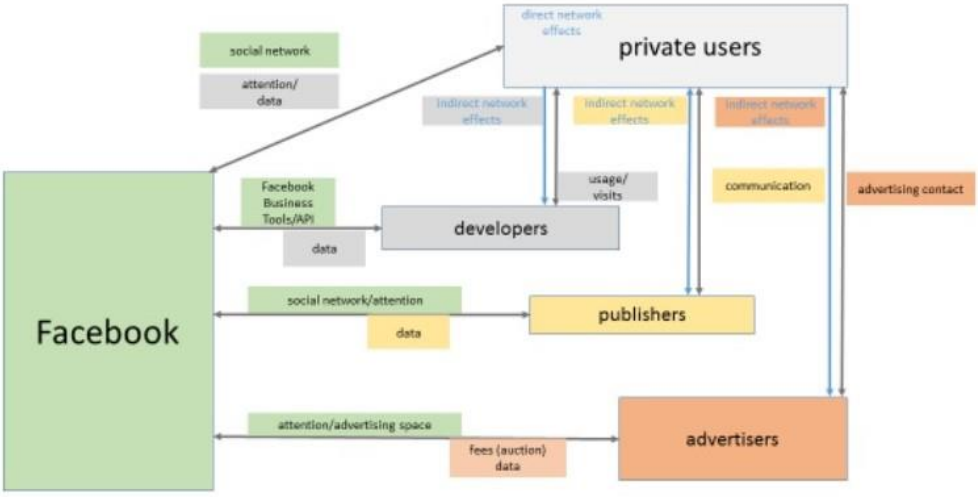
Having regard to the relevant market definition, the Bundeskartellamt defined the product market as the private social network market,[720] whilst the geographic one comprised the German territory only.[721] In particular, the Authority observed that Facebook in 2018 reached the impressive amount of 23 million active users on a daily basis and 32 million monthly active users[722] (on a population amounting to 82,792,351 people in 2018[723]).

In defining the relevant market, the German Federal Cartel Office relied on the new paragraphs 18(2a), (3a) and (3b) of the GWB, added in 2017. In particular, paragraph 18(2a) states that the assumption of a market notwithstanding the fact that a product or service is offered for free.[724] Additionally, paragraph 18(3a) provides that *in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of: 1. Direct and indirect network effects, 2. the parallel use of several services and the switching costs for users, 3. the undertaking's economies of scale arising in connection with network effects, 4. the undertaking's access to data relevant for competition, 5. competitive pressure driven by innovation.*[725] Finally, paragraph 18(3b) specifies that *in assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account shall be taken in particular of the importance of*

[720] Bundeskartellamt, *Facebook*, cit., points 212, 230, 274.
[721] *Ibidem*, 344.
[722] *Ibidem*, 17.
[723] Eurostat, Population on 1 January, available at https://ec.europa.eu/eurostat/databrowser/view/tps00001/default/table?lang=en (accessed 20 July 2021).
[724] Bundeskartellamt, *Facebook*, points 238-242.
[725] English official translation provided by the Bundeskartellamt, available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0025 (accessed 20 July 2021).

the intermediary services provided by the undertaking for accessing supply and sales markets. At this point, it is worth noting how the German GWB addresses many of the issues we have analysed about competition in digital markets. In this sense, it can be regarded as a very up-to-date piece of legislation.

The abovementioned provisions allowed the Bundeskartellamt to better fit the market definition exercise to Facebook's business. In particular, the German Authority described Facebook as a network funded through targeted advertising, where private users are active on the social network, which is the free side of the network, while advertisers are active on the other side.[726] Moreover, the Bundeskartellamt identified also other sides of the network: We are referring to developers, which can integrate Facebook tools into their website by means of the 'like' or 'share' button or login services, and publishers using Facebook in order to promote their business.[727] According to the German watchdog, indirect network effects occur among users and all the other sides of the platform, as well explained by the Authority through the following scheme:[728]



Anyhow, as already seen, in order to define a market, substitution constitutes a necessary exercise. The Bundeskartellamt performed it with regard to the broader 'social media' market and it found that a national (Germany) market for social

[726] Bundeskartellamt, *Facebook*, cit., points 214, 216, 219.
[727] *Ibidem*, 223-229.
[728] *Ibidem*, 229.

networks (such as Facebook) could have been defined. In particular, the Authority identified a market in which Facebook face the competition of small German operators only, given also Google+'s exit from this market. The Bundeskartellamt also distinguished the social network service offered by Facebook from other apps such as LinkedIn, WhatsApp, Snapchat, YouTube or Instagram, which shall consequently be excluded from the relevant market at stake in the case under analysis.[729] In fact, they are based upon different business models and technical characteristics.

According to Section 18(1) of the GWB, the Bundeskartellamt deemed Facebook dominant in the previously defined German market for social networks. In particular, the mentioned provision states that a firms shall be considered dominant in a relevant market when it *1. has no competitors, 2. is not exposed to any substantial competition, or 3. has a paramount market position in relation to its competitors*. In order to determine that Facebook did not suffer from significant competitive constraint in the defined market, the German Authority examined Facebook's market shares, which were particularly high. Precisely, the firm's market shares with regard to daily active users amount to 95%,[730] whilst it is around 80% if monthly active users are considered[731] and above 50% in relation to registered users.[732] If we consider that according to Section 18(4) of the GWB the dominance threshold is established at 40%, it results evident that Facebook held a dominant position for the purposes of the case at stake. Moreover, and tellingly, the German Authority found that Facebook would have maintained above-level market power percentages also if other services, like YouTube or Snapchat would have been included into the relevant market.[733]

The Authority focused on consequences brought by the already analysed strong direct network effects (as seen, established when users interact directly on the platform) characterising Facebook and on the difficulties that users face in case they would migrate to another social network service. In particular, the

[729] *Ibidem*, 264-343.
[730] *Ibidem*, 392.
[731] *Ibidem*, 395.
[732] *Ibidem*, 398.
[733] *Ibidem*, 306, 316.

Bundeskartellamt noticed that whilst Facebook competitors' operational results were negative, Facebook ones faced an increase or however remained stable at its high values.[734] An example of an eminent competitor who left the market is represented by Google+, which cannot overcome Facebook strong network effects also if it was part of the Google galaxy,[735] thus finally leaving the market. These examples demonstrate a tipping process of the social network services market in favour of Facebook. In particular, at this purpose is relevant that Facebook's high customers base disincentivises users from switching to other services, even if they are, for instance, more respectful of data protection. The reason is explained, as anticipated, by network externalities, because, putting it simply, why should you leave a highly populated social network to join another service with a lower user base? It is the same discourse that in the 'real world' can be applied to aggregation places like pubs.

Conversely, indirect network effects (occurring when a high use of the product on one side of the platform increases its appeal to another group of users) may erect barriers to entry for possible Facebook competitors, given its advertising-funded market structure. Indeed, potential competitors might find it difficult to fund their social networking service, in particular given Facebook's very strong position with regard to users' data. As a matter of fact, Facebook can collect a huge amount of very personal data about its users, and it can use these data in order to finance its product by means of personalised advertising. Of course, competitors lacking such a precious dataset, would find particularly difficult to sustain Facebook's competition and consequently they are very little likely to come and displace the dominant company by means of competition on the merits. As a final point with reference to market definition and Facebook's dominance, the German Authority did not find that innovation characterising the internet environment has the power to undermine Facebook's dominant position.[736]

However, given this necessary introduction about how the Bundeskartellamt defined the market for social network and on what elements it considered to

[734] Bundeskartellamt, *Facebook*, cit., 432-451.
[735] *Ibidem*, 437, 444
[736] Bundeskartellamt, *Facebook*, cit., 501-521, especially 504.

establish that Facebook held a dominant position on such a market, the most relevant and innovative aspect of this decision has regard to the interplay between competition law and data protection rules, based on the allegedly abusive data policy employed by Facebook.

From a competition law perspective, the data policy consisting of merging into the users' Facebook account data gathered from Facebook, as well as from other Facebook-owned apps and from third-party websites was judged by the Bundeskartellamt as amounting to an exploitative abuse of dominant position contrary to Section 19 of the GWB (which nearly follow the content of Article 102 TFEU). In addition, such a policy was deemed in contrast with the provisions contained in the GDPR. In particular, this reasoning lies in the broader interpretation given by the Bundesgerichtshof to Section 19(2)2 of the GWB, which provides that the conduct of a dominant undertaking shall be deemed abusive in case it *demands payment or other business terms which differ from those which would very likely arise if effective competition existed*. This approach was developed in the *VBL-Gegenwert*[737] cases and in the *Pechstein* decision.[738] In detail, the *VBL-Gegenwert* rulings established that contractual conditions contrary to a provision of the German Civil Code (Sections 307 and following) shall be deemed abusive with reference to Section 19 GWB in case they were imposed due to superior or excessive market power.[739] Such interpretation was further extended by means of the *Pechstein* judgement, which considered Section 19 of the GWB as a 'general clause', whose abuse shall be assessed also on the basis of a violation of the weaker party's constitutional rights by the counterparty exercising market power.[740] Given this reading, the Bundeskartellamt considered that it shall be applied also to the field of data protection law, as its purpose is that of allowing the parties to freely decide who could gather and process their own data and how,

[737] Bundesgerichtshof, decision 24 January 2017, case KZR 47/14, *VBL-Gegenwert II*, following decision 6 November 2013, case KZR 58/11, *VBL-Gegenwert I*.
[738] Bundesgerichtshof, decision 6 July 2016, case KZR 6/15, *Pechstein/International Skating Union*, English translation available at https://www.tas-cas.org/fileadmin/user_upload/Pechstein___ISU_translation_ENG_final.pdf (accessed 21 July 2021).
[739] R. Pardolesi and C. Osti, *L'antitrust ai tempi di Facebook*, Mercato Concorrenza Regole, 2019, 2, 201.
[740] *Ibidem*. See Bundesgerichtshof, *Pechstein*, cit., para 57.

without any coercion or undue influence by, with specific reference to the present case, powerful counterparties (right to self-determination without information asymmetries). Here starts what can be considered the most innovative part of the Bundeskartellamt's reasoning in *Facebook*. In fact, the Authority read the case under the joint light of both Section 19 of the GWB and the GDPR. In particular, according to the abovementioned cases ruled by the Bundesgerichtshof, data protection, given also the constitutional status of the rights it protects, shall be taken into account while data processing policies of investigated firms are scrutinised form the purposes of competition law.[741]

The German Competition Authority's approach to the intersection between competition law and data protection provisions is focused on the interaction between the consent required to users for the purpose of processing their personal data and Facebook's market power role in asking for this consent. Indeed, the consent given by users to Facebook does not satisfy the requirements provided for by Article 6 GDPR. As a matter of fact, users were required a consent which was not necessary for the service they were agreeing to. In fact, the processing of 'off-Facebook' data was deemed necessary neither for running the social network for the purposes of providing the users with the social networking service, nor for monetising Facebook.[742] Indeed, these aims could have been pursued by gathering and processing 'on-Facebook' data only. So why do users agree and give their consent? According to the Bundeskartellamt this consent is not free, and it is given precisely due to Facebook's market power, because users only want to enter into the contract with Facebook and use the social network. Therefore, users face a 'take it or leave it' scenario, where they have the possibility of agreeing to Facebook's terms and conditions and connect with all the friends and users signed in Facebook or they can refuse Facebook's conditions, but at the price of losing the opportunities offered by the social network.[743]

In this sense, the same GDPR, at Recital 43, provides that *in order to ensure that consent is freely given, consent should not provide a valid legal ground for the*

[741] Bundeskartellamt, *Facebook*, cit., 523-524.
[742] *Ibidem*, 741-754, 897.
[743] *Ibidem*, 901-902.

processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller […]. Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance. Moreover, Article 7, paragraph 4, of the same GDPR states that *when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to processing of personal data that is not necessary for the performance of that contract*.

Having regard to the causality between Facebook's conduct and the degree of market dominance it enjoys, the German Authority outlined a normative causality link and one related to the final outcome on users.[744] Having regard to the former, this is simply satisfied because of Facebook dominant position, as data protection law considers also market dominance as a parameter to be analysed during the assessment of an alleged violation.[745] In particular, the violation of data protection rules by Facebook were considered as a manifestation of its market power.[746] Having regard to the outcome on final users, the Bundeskartellamt sustained that precisely the barriers to entry put in place by Facebook's market dominance, gained through the investigated anticompetitive and abusive conduct, have impeded their competitors to enter effectively into the social network market, thus offering consumers with valuable competing services.[747]

Another matter solved by the German Federal Cartel Office is to what extent a competition Authority may apply data protection rules during the assessment of a case. On this point, the Bundeskartellamt stated that although data protection Agencies have been established, nothing deny the possibility of applying data protection rules to competition Authorities. Contrarywise, such additional

[744] *Ibidem*, 873-884.
[745] *Ibidem*, 525-526, 879.
[746] *Ibidem*, 880.
[747] *Ibidem*, 494-500, 885-888.

application may well pursue the scope of a better implementation of data protection provisions and their consequent development. Moreover, the Authority kept regular contact with data protection Agencies, which did not rule out the possibility that another Authority could apply data protection rules. Moreover, for instance, the Hamburg Commissioner for Data Protection and Freedom of Information explicitly sustained the Bundeskartellamt's case.[748]

In the end, the Bundeskartellamt – and this marks a significant shift vis-à-vis 'normal' competition cases – did not impose a pecuniary fine on Facebook but ordered the firm to stop and change its current data processing policy. In particular, it urged Facebook not to aggregate data gathered through means other than the social network itself (e.g., Instagram, WhatsApp, cookies or Facebook Business Tools) without the specific users' consent. Obviously, users should now have the possibility of using the social network by also agreeing to the gathering of 'on-Facebook' data only.[749] In a nutshell, the collection of 'off-Facebook' data cannot constitute a necessary condition for users willing to use Facebook.

The Bundeskartellamt decision was then appealed on an interim basis before the Oberlandesgericht Düsseldorf, which ruled in favour of Facebook and suspended the Bundeskartellamt decision on 26 August 2019.[750] In brief, the Düsseldorf Court sustained first that no damages to competition were caused by Facebook's conduct, as no financial loss was suffered by users, who, on the contrary received appreciated services from Facebook.[751] Accordingly, the Court affirmed that causality between Facebook's conduct and its market dominance was not demonstrated, and also the exclusionary conduct vis-à-vis competitors was not proved, because the anticompetitive effect has not been demonstrated, again.[752] Moreover, users were

[748] *Ibidem*, 548. Interestingly, the Hamburg Commissioner for Data Protection and Freedom of Information stated that *abusive market behaviour which violates data protection rules and leads to a situation where fair competition is no longer possible in digital markets, must be stopped. In this respect, data protection and competition law are two sides of the same coin. The activities of the Bundeskartellamt strive to ensure that it will no longer pay off to violate data protection rules in order to gain market power. The authority can be sure of the support of the Hamburg Commissioner for Data Protection and Freedom of Information*.
[749] *Ibidem*, 949.
[750] Oberlandesgericht Düsseldorf, decision 26 August 2019, VI-Kart 1/19 (V).
[751] R. Pardolesi and C. Osti, *L'antitrust ai tempi di Facebook*, cit., 204; K. Wiedemann, *A Matter of Choice*, cit., 1170.
[752] R. Pardolesi and C. Osti, *L'antitrust ai tempi di Facebook*, cit., 206.

not harmed by Facebook's terms, because they can freely choose not to give their consent and, therefore, not to use Facebook's services.[753] Finally, also the 'special responsibility' requirement for dominant firms was not deemed useful for the case at stake, as it is necessary for conducts regarding competition law, but not for data protection provisions, as it would have been in the case at stake.[754]

The Oberlandesgericht Düsseldorf's 'old-fashioned' interpretation was then overruled by the Bundesgerichtshof on 23 June 2020.[755] Of course, this decision, which arises from an interim proceeding, does not define the matter, but it clearly gives an insight into what the definitive opinion of the same Court could be.

First of all, the Bundesgerichtshof – and this point is quite significant – recognised the role that data have as a counter-performance between Facebook and its users.[756] The Court, as already done by the Bundeskartellamt, analysed the characteristics of Facebook's business model and its structure as a multi-sided market, and considered the relationships among these sides. Moreover, the Bundesgerichtshof stuck with the Bundeskartellamt and rejected the Oberlandesgericht approach with regard to causality and the market power exercised by Facebook. In particular, it followed the Bundeskartellamt's normative approach.[757] As pointed out by Wiedemann, here the Court adopted the requirement used at European level for exclusionary abuses, rather than those for exploitative ones.[758] In this context it is the overall harm to competition (quite an Ordoliberal idea) caused by the dominant

[753] *Ibidem*; K. Wiedemann, *A Matter of Choice*, cit., 1170.
[754] R. Pardolesi and C. Osti, *L'antitrust ai tempi di Facebook*, cit., 206.
[755] Bundesgerichtshof, decision 23 June 2020, KVR 69/19, *Facebook*. An English courtesy translation of the decision has been provided by the Bundeskartellamt and is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.pdf?__blob=publicationFile&v=3 (accessed 1 November 2021). The relevant press release's English courtesy translation has been provided by the Bundeksartellamt and is available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2 (accessed 1 November 2021). See, *inter alia*, comments on this decision by R. Scheele, *Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice*, Journal of European Competition Law & Practice, 2021, 12, 1, 34. See also DLA Piper, *Germany: Federal Court summary judgement: FCO achieves stage victory against Facebook*, 25 June 2020, available at https://blogs.dlapiper.com/privacymatters/germany-federal-court-summary-judgment-fco-achieves-stage-victory-against-facebook/ (accessed 1 November 2021).
[756] Bundesgerichtshof, *Facebook*, cit., points 28-29, 62.
[757] *Ibidem*, 65-83.
[758] K. Wiedemann, *A Matter of Choice*, cit., 1172. See ECJ, *Continental Can*, cit, paras 26-27 and ECJ, *Hoffmann-La Roche*, cit., para 91.

company's exercise of market dominance that matters.[759] Indeed, the fact that competition is harmed by Facebook's conduct is also shown by the fact that users do not behave as they were acting in a competitive market. As pointed out also by the Federal Cartel Office, users are worried about giving consent also to the processing of 'off-Facebook data', but they do, and Facebook does not propose an alternative option. But this is possible only in a market where Facebook does not face any competitive pressure, because, in a different scenario, in theory, users should prefer the less invasive option for their personal information and Facebook, in order to maintain its dominant position, shall provide this qualitative increase to users. Anyhow, if we think at the effect of Facebook's conduct on competitors – as happened to DuckDuckGo in the market for internet browsers – a hypothetical privacy-compliant competitor of Facebook might have offered a good product, but not being followed by users, which stuck with the dominant firm thirst of personal information, which is the user's 'default option'. The described search engine situation can indeed be replicated also in the market for social networks, because of barriers to entry and expansion. In fact, as we have seen, data are a fundamental asset for financing and developing both an internet search engine, a browser or a social network. The higher amount of data a firm has, the more it can be funded through advertising and the more it can attract users by offering more performing and personalised content, due to a positive feedback loop. The Bundesgerichtshof acknowledged that Facebook data policy allowed it to gain such a position, which lead to erecting barriers which prevent potential market entrants to be funded and launch or develop a successful competing social network, thus stifling competition.[760]

Having regard to the profile concerning data protection, the Bundesgerichtshof did not rule on the validity of users' consent according to the GDPR,[761] but it discussed around the role that influent private entities shall have with respect to fundamental rights according to the *mittelbare Drittwirkung* doctrine,[762] which involves third-

[759] K. Wiedemann, *A Matter of Choice*, cit., 1172.
[760] Bundesgerichtshof, *Facebook*, cit., 92-97.
[761] K. Wiedemann, *A Matter of Choice*, cit., 1174.
[762] Bundesgerichtshof, *Facebook*, cit., 102.

party effect of fundamental rights.[763] In detail, the Bundesverfassungsgericht *Stadionverbot* precedent cited by the Court[764] recognised that in certain cases also private entities are bound by the Constitutional principles and fundamental rights contained in the *Grundgesetz*. Given that Facebook is a sort of 'agora' for public debate and opinion sharing, it was deemed subject to this doctrine.[765] Consequently, as already pointed out by the Bundeskartellamt, the rules enshrined in the GDPR as well the right to informational self-determination come into play and Section 19 of the GWB, as a general clause of German private law, shall be interpreted accordingly.

In conclusion, the Court confirmed the Bundeskartellamt's sanction, but, as clearly pointed out by Wiedemann, it reached this conclusion from a more genuine competition law perspective, based on the principle of user autonomy, rather than on purely data protection consideration.[766] In particular, as argued by the Author, the Bundesgerichtshof decision *puts the role of users as market participants at the forefront, not their role as data subjects*.[767]

The approach followed by the Bundesgerichtshof shall be deemed correct and welcomed while developing an approach to competition law that can be effective vis-à-vis tech giants and data-driven markets. In particular, the considerations about the respect of fundamental rights by third-partied having a sort of 'social roles' are of particular interest and, as also expressed by Wiedemann, can play a significant role in a possible novel interpretation of the essential facilities doctrine,[768] that we will analyse below in this chapter.

However, the *Facebook* saga shall be considered as just started: We have described here the Bundeskartellamt's decision and the subsequent interim judgements.

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[763] K. Wiedemann, *A Matter of Choice*, cit., 1173. On this doctrine see also M. Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law*, Oxford University Press, 2016, 42-44.
[764] Bundesverfassungsgericht, decision 11 April 2018, 1 BvR 3080/09, *Stadionverbot*, whose English summary translation is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html (accessed 1 November 2021).
[765] K. Wiedemann, *A Matter of Choice*, cit., 1179.
[766] *Ibidem*, 1176.
[767] *Ibidem*.
[768] *Ibidem*, 1179.

Nevertheless, in the context of the main proceeding, pending before the Oberlandesgericht Düsseldorf, a referral to the Court of Justice has been raised on 24 March 2021, in order to understand the limits of the application of data protection rules by the Bundeskartellamt, together with an evaluation around the abusive nature of Facebook's data policy.[769] Now we have only to wait for the Luxembourg Judges' ruling, aware that this decision will be fundamental for the evolution of competition policy in digital markets: If it stuck with the Bundesgerichtshof, it would establish a milestone for a more progressive antitrust enforcement in this context, but in case of a judgement in Facebook's favour, the whole application of competition law in these markets would need to be rethought. Anyhow, we deem the former scenario as the more likely, based on the same considerations expressed by the Bundeskartellamt and the Bundesgerichtshof. In fact, we see no issues in the complementary application of data protection rules in the context of an antitrust probe, as well as the harm to competition sustained in the previously analysed decisions appears evident and well-founded from an evidentiary standpoint.

In particular, we believe that the matter concerning the described 'overlap' of data protection and competition rules will be solved by the ECJ in a way that would take into account the context in which these disciplines operate. This solution, probably, will be closer to the Bundesgerichtshof approach than the Bundeskartellamt's one, but the outcome, as we have seen, will not change. It is only a matter of perspective and, at a certain extent, legal precision and certainty. This view is supported both in some official statements and also in scholarships. In particular, the Autorité de la Concurrence and Bundeskartellamt's joint report stated that other fields such as data protection law shall be taken into account as a context in competition law cases, if

[769] Oberlandesgericht Düsseldorf, decision 24 March 2021, case Kart 2/19 (V), *Facebook*. This decision is available (in German only) at https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html (accessed 21 July 2021). See also M. Inverardi, *German court turns to top European judges for help on Facebook data case*, Reuters, 24 March 2021, available at https://www.reuters.com/business/legal/german-court-turns-top-european-judges-help-facebook-data-case-2021-03-24/ (accessed 21 July 2021); S. Stolton, *German legal dispute over Facebook data use sent to European Court of Justice*, Euractiv, 24 March 2021, available at https://www.euractiv.com/section/data-protection/news/german-legal-dispute-over-facebook-data-use-sent-to-european-court-of-justice/ (accessed 21 July 2021).

required by the case at stake.[770] Anyhow, as pointed out by Botta and Wiedemann, such a position can be found through a systematic reading of the ECJ jurisprudence.[771] Therefore the mentioned Authors conclude their reasoning by stating that *whereas EU competition law should not pursue data protection goals, competition law enforcers should have the discretion to intervene in case of market failures in the data economy, even in the presence of overlapping data protection and consumer law applicability*.[772] In conclusion, it is possible to believe that the ECJ will rule in this direction, also because thinking that these fields of law are separate would be simply anachronistic. If the intention is that of effectively applying competition law in the digital context, the interplay among competition and fields such as, above all, data protection, but also consumer law, cannot be ignored at all. This conclusion is supported also by the whole structure of EU law, as – reading through the TFEU's lines – both competition and privacy protection are objectives that shall be pursued (Articles 101-102 and 16 TFEU). Furthermore, nothing prevents, also according to Article 7 TFEU, a joint application of these two disciplines. Rather, a disjunctive approach, when a joint one is instead required, may be contrary to the consistency requirement contained in the mentioned TFEU provision.

2.2.2.2. Consumer law as a tool against tech giants: The AGCM's Facebook decision

[770] The report states that *the fact that some specific legal instruments serve to resolve sensitive issues on personal data does not entail that competition law is irrelevant to personal data. Generally speaking, statutory requirements stemming from other bodies of law may be take into account, if only as an element of context, when conducting a legal assessment under competition law* (p. 23).
[771] M. Botta and K. Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, cit., 436-437. In particular, the ECJ stated that the legality of a conduct under another field of law does not impede the application of EU competition law. At this purpose see European Court of Justice, decision 14 October 2010, case 280/08 P, *Deutsche Telekom AG v. Commission*, paras 80-85; decision 6 December 2012, case C-457/10 P, *AstraZeneca v. Commission*, para 132. In the latter case, the Court in fact stated that *the illegality of abusive conduct under Article 82 EC is unrelated to its compliance or non-compliance with other legal rules*.
[772] M. Botta and K. Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, cit., 437.

Having regard to Facebook, an alternative route, based on consumer law, was instead explored by the Italian Competition Authority (AGCM) in a proceeding ended in November 2018.[773] The AGCM imposed a 10 million euro fine on the social network for behaviours contrary to the Italian Consumer Code. In particular, the AGCM held that Facebook misled consumers by stating that the service was offered for free, whilst, in reality, users paid with their personal information.[774] Moreover, Facebook was also held liable of adopting an aggressive behaviour towards consumers with regard to data transfers to third-party websites for commercial purposes. In detail, Facebook first provided its service with a default setting allowing for this data transfer. However, it allowed consumers to turn off this option, but warned them that this more privacy-compliant choice could have impaired their experience on the social network,[775] thus, at a certain extent, 'forcing' them not to turn off the data transfer default setting.

The AGCM adopted this decision on a completely different legal basis than the soon to have issued Bundeskartellamt decision. Both the Authorities had good reasons for their choice: Opting for a proceeding based upon consumer law has the benefit of not carrying out a complex market definition exercise, as the Bundeskartellamt did.[776] From this standpoint, consumer law can be more flexible and 'simple' to apply. Anyhow, if the Authority, as the Bundeskartellamt did, is willing to show a firm's market power and assess its impact on the market, competition law is the only route. This latter approach can also be integrated by consumer law or data protection law, but when market power is concerned, competition law has the stage. And indeed, the market definition exercise shall not be regarded as an obstacle that can prevent the application of competition rules. Instead, an innovative approach, like the Bundeskartellamt's one, is necessary in

[773] Autorità Garante della Concorrenza e del Mercato, proceeding PS11112, decision 29 November 2018, *Facebook*, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf (accessed 22 July 2021). The relevant press release (in English) is available at https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes (accessed 22 July 2021).
[774] *Ibidem*, points 4, 18-22.
[775] *Ibidem*, points 5, 23-32.
[776] M. Botta and K. Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, cit., 443.

order to make competition law again fit for tackling excessive market power and restoring a true competitive economy. However, as we have already pointed out, a *multi-tool* approach among 'close' disciplines like competition law, data protection law and consumer law, shall be valorised and not impeded.[777]

The AGCM's decision differs from the Bundeskartellamt one also for the remedy imposed on Facebook. In fact, whilst the Bundeskartellamt did not imposed a fine, but rather a structural remedy, the Italian Competition Authority imposed a heavy (but also ineffective[778]) fine on the social network, together with an obligation of updating its homepage in order to clarify its terms and conditions to users (this remedy appears, of course, typical of the consumer law context used by the Italian watchdog). Anyhow, Facebook disregarded this latter obligation and the AGCM imposed a new fine of 7 million euro for this conduct on 9 February 2021.[779]

For the sake of completeness, it is also worth mentioning that the AGCM decision was then partially confirmed on appeal by both the TAR Lazio[780] and the Consiglio di Stato.[781] In detail, the TAR Lazio annulled the AGCM's sanction with regard to the data transfer conduct, because the relevant reconstruction was not deemed accurate, and the Authority did not show that Facebook's behaviour was really capable of influencing the consumers' choices.[782] Anyhow – as we have already

[777] Interesting research works about the interplay between competition law and consumer law can be found, *inter alia*, in P. Nebbia, *Competition Law and Consumer Protection Against Unfair Commercial Practices. A More-than-Complementary Relationship?*, in D.D. Sokol & I. Lianos (Eds.), *The Global Limits of Competition Law*, Stanford University Press, 2012, 127, who, among other things (with the aim of highlighting the important role of consumer law for a competitive market) argues that *the impact of a mass-scale implementation of an unfair commercial practice may well go beyond the individual, business-to-consumer relationship and may prevent the effective operation of competition* (pp. 132-133); A. Albors-Llorens, *Competition and Consumer Law in the European Union: Evolution and Convergence*, Yearbook of European Law, 2014, 33, 163; G. Monti, *The Revision of the Consumer Acquis from a Competition Law Perspective*, European Review of Contract Law, 3, 2017, 295; N.W. Averitt & R.H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, Antitrust L.J., 65, 1997, 713; N.W. Averitt & R.H. Lande, *Using the Consumer Choice Approach to Antitrust Law*, Antitrust L.J., 74, 2007, 175.
[778] *Ibidem*, 444.
[779] Autorità Garante della Concorrenza e del Mercato, decision 9 February 2021, proceeding IP330, *Facebook*, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/IP330_chiusura.pdf (accessed 22 July 2021). The relevant press release (in Italian only) is available at https://www.agcm.it/media/comunicati-stampa/2021/2/IP330- (accessed 22 July 2021).
[780] TAR Lazio, decision 10 January 2020, no. 261, *Facebook*.
[781] Consiglio di Stato, decision 29 March 2021, no. 2639, *Facebook*.
[782] TAR Lazio, *Facebook*, cit., points 15-17.

reported – also the Italian administrative judiciary noteworthily recognised the nature of consideration that personal data play in the digital market context and confirmed the AGCM's decision with regard to this profile.[783]

Once having established – by means of the analysis conducted above – that privacy represent a quality aspect in the assessment of competition cases, it is now worth focusing on the renewed role that quality overall shall play in competition law investigations.

2.3. Free services and quality degradation

In digital markets services are sold for zero or nominal price, therefore quality represents the main parameter that can influence the competitive strategy of companies,[784] as well as the assessment of conducts carried out in these markets. Indeed, if normally an anticompetitive conduct may imply a price increase, it could also take the form of a decrease in quality, which, in the digital context, may consists in less transparency or in a lower data protection degree.[785] However, as pointed out by the AGCM, the use of big data may also provide better services for consumers. In fact, personalised suggestions might lower users' transaction costs, thus delivering a better-quality service and increasing the general welfare of the consumer.[786] Consequently, in the current discourse, the key point is how companies use users' data and how much this use is in our interest or in their profit, and in case an imbalance towards the latter voice is registered, whether the services provided in our interest represent only the 'cheese in the mousetrap'.

Enhanced innovation, higher quality and lower prices are expected to be the natural outcomes that a healthy competitive process shall deliver to consumers. Whilst innovation will be analysed later in this chapter, we would like to analyse here the role played by quality, which is well recognised almost unanimously. In particular,

[783] *Ibidem*, point 6; Consiglio di Stato, *Facebook*, cit., point 7.
[784] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 82.
[785] *Ibidem*. See also A. Ezrachi and M.E. Stucke, *The Curious Case of Competition and Quality*, Journal of Antitrust Enforcement, 2015, 3, 227.
[786] *Ibidem*, 87.

the OECD has perfectly summarised the issue in its 2013 Report *The Role and Measurement of Quality in Competition Analysis*.[787] Here the Organisation for Economic Co-operation and Development affirmed that *quality represents perhaps the key non-price consideration that determines whether consumers will purchase a product. Moreover, quality considerations frequently drive innovation within a market, thereby improving dynamic efficiency*.[788] From the quoted lines it results evident how the aspects enlisted above, *i.e.* innovation, quality and also price (although not mentioned here) are interlinked. Also the U.S. Supreme Court has recognised that *the Sherman Act reflects a legislative judgement that, ultimately, competition will produce not only lower prices but also better goods and services*.[789] However, the OECD has perfectly stressed the difficulties in adding quality profiles into the competitive assessment of conducts, especially if we have regard to the certainty of its measurement. Indeed, the Organisation sustained that *there are difficulties in terms of measuring quality attributes accurately, as well as in determining the impact of quality factors within the broader competition context. Thus, while most competition authorities would acknowledge the potentially key role of quality within competition enforcement, few agencies have as yet succeeded in incorporating systematically the assessment of quality within their competition analytical processes*.[790] In light of these difficulties in measuring quality, the price parameter has emerged as the principal proxy used by competition Authorities, although, as noted by Wils, the assumption that consumers only value price and not quality does not have sound economic basis.[791] Indeed, as noted also by the European Commission, quality is multifaceted, and its perceptions may vary depending on the observer's tastes and perceptions.[792] Moreover, given the information asymmetries characterising many markets and also the digital ones

[787] OECD, *The Role and Measurement of Quality in Competition Analysis*, 28 October 2013, available at https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf (accessed 27 June 2021).
[788] *Ibidem*, 5.
[789] U.S. Supreme Court, decision 25 June 2014, *Riley v. California*, 134 S Ct 2473 (2014), at 695. See also OECD, *The Role and Measurement of Quality in Competition Analysis*, cit., 119.
[790] OECD, *The Role and Measurement of Quality in Competition Analysis*, cit., 5.
[791] W. Wils, *The Judgement of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, World Competition, 2014, 37, 4, 429.
[792] *Ibidem*, 79. See also A. Ezrachi and M.E. Stucke, *The Curious Case of Competition and Quality*, cit., 229-230.

(here it is worth reminding the considerations made about privacy policies, but think also at the low level of knowledge that consumers have about the firms' data processing policies), it is very difficult for consumers to really assess the quality of the various products.[793] From an economic standpoint, consumers' lowered quality perception vis-à-vis information asymmetries was brilliantly addressed by Akerlof in his study about the 'market for lemons'.[794] In particular, Akerlof's study pointed out that where information asymmetries are present, the consumer may not correctly understand what is the right balance between the right price for a given quality of the purchased goods.[795] In our opinion, this may result particularly evident in digital and zero-price markets, when information asymmetries and the nominal or zero-price paid may deceive consumers on the real quality of the service provided, thus leading them to the exploitation of their privacy. In this sense, Balkin tellingly stated that *in this environment, the idea of relying on informed consumer choice to discipline social media companies is fantasy*.[796] Indeed, consumers might not perceive that the service provided (e.g., a free email box or free cloud storage) is of course valuable, but not at the point of letting the service provider using their data in the manner outlined above. An example is provided by the European Commission's *Google Search* decision, in which was affirmed that the majority of users was not aware of the fact that there were different processes behind the search results' ranking.[797] As a result of these practices, consumers might result mistaken in their choice, which – as we have already explored – may also be influenced by other factors such as lock-in effects and behavioural biases.[798]

Moreover, in two-sided and zero-price markets, as noted by Ezrachi and Stucke, given that platforms make their profits from one side of the market, they are

[793] A. Ezrachi and M.E. Stucke, *The Curious Case of Competition and Quality*, cit., 237-238. The Authors here analyse the situation in which competition is distorted by misleading and deceptive advertisement, but we think that this assumption can be extended in general terms to the whole quality assessment discourse. Moreover, the Authors correctly sustain that when customers are unable to assess quality, firms are not encouraged in improving their products' quality (p. 241-242).
[794] D. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, Quarterly Journal of Economics, 1970, 84, 488. See also P. Gallo, *Trattato del contratto – Tomo I*, UTET, 2010, 297-299.
[795] P. Gallo, *Trattato del contratto – Tomo I*, cit., 287-288.
[796] J.M. Balkin, *Fixing Social Media's Grand Bargain*, cit., 5.
[797] European Commission, *Google Search (Shopping)*, cit., points 437, 536, 599, 670.
[798] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 58.

incentivised to degrade quality on the other one.[799] Therefore, in these markets quality shall play the main role[800] and the problems in translating it into a quantitative parameter need to be solved quickly. A solution can be found in the replacement of the traditional SSNIP test with a SSNDQ test in defining two-sided markets.

2.4. Definition of digital markets for competition law purposes

Defining the relevant market is considered an essential task to be performed in a competition law case's assessment.[801] This exercise, which is prominently an economic one, generally consists in delimiting both a product and a geographic market in order to establish the presence of market power.[802] The market so defined represents the perimeter into which the market power involved in the relevant case can be exercised.[803] In particular, according to the European Commission's market definition notice, *a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*.[804]

With reference to the product market, this represents an ensemble of products on which it is possible to exercise a significant degree of market power.[805] As a consequence, in order to check if this condition occurs, competition Authorities carry out the so-called SSNIP (Small but Significant Non-transitory Increase in Price) test or hypothetical monopolist test. This is aimed at verifying if the hypothetical monopolist is able to increase in a small (although significant, ranging

[799] A. Ezrachi and M.E. Stucke, *The Curious Case of Competition and Quality*, cit., 243.
[800] As noted by the European Commission in its *Microsoft/Skype* decision (7 October 2011, Case COMP/M.6281 – *Microsoft/Skype*) *since consumer communications services are mainly offered for free, consumers pay more attention to other features. Quality is therefore a significant parameter of competition* (point 81). See also A. Ezrachi and M.E. Stucke, *The Curious Case of Competition and Quality*, cit., 233.
[801] L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, Journal of Competition Law & Economics, 2014, 10, 2, 294.
[802] R. Whish and D. Bailey, *Competition Law*, cit., 26; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 100.
[803] A. Frignani e S. Bariatti, *La disciplina della concorrenza nella UE*, cit., 48.
[804] Commission Notice on the definition of relevant market for the purposes of Community competition law, point 7, published in the OJ of the EU 9 December 1997, C 372/5.
[805] A. Frignani e S. Bariatti, *La disciplina della concorrenza nella UE*, cit., 49.

from 5 to 10 percent of the starting price[806]) and non-transitory (generally one year) way the prices of all the products included into the scrutinised market, if compared to the prices of these products under normal competitive conditions. The test is conducted by simulating the price increase by a monopolist who sells only one product. Then, the test is repeated by adding progressively more products hypothetically owned by the monopolist. When this monopolist does not suffer a decline in profits after the small, significant and non-transitory increase in price, the ensemble of products hypothetically owned by the monopolist in the last test constitutes the relevant market for the case at stake.[807]

According to the EU Court of Justice, the determination of the relevant market in abuse of dominance cases *is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers*.[808] Central in defining markets is the concept of substitutability of products. In detail, only products which have a certain degree of substitutability among them are part of a relevant market.[809] As put by the Court of Justice in the *Hoffman-La Roche* case,[810] *the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such*

[806] Commission Notice on the definition of relevant market for the purposes of Community competition law, cit., points 17-18, 40. See also A. Frignani e S. Bariatti, *La disciplina della concorrenza nella UE*, cit., 49-51. This approach has been endorsed also in the U.S. starting from the 1982 Merger Guidelines.

[807] L. Filistrucchi, *Market definition in multi-sided markets*, in OECD, *Rethinking Antitrust tools for Multi-Sided Platforms*, 2018, 45, available at https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf (accessed 28 June 2021).

[808] European Court of Justice, decision 9 November 1983, case C-322/81, *N.V. Nederlandsche Banden-Industrie-Michelin v. Commission*, para 37.

[809] M. Eben and V.H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil*, Graz Law Working Paper Series no. 01-2021, 3, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3787313_code4335028.pdf?abstractid=3762447&mirid=1 (accessed 28 June 2021). See also R. Whish and D. Bailey, *Competition Law*, cit., 30-33; A. Jones, B. Sufrin, N. Dunne, *Jones & Sufrin's EU Competition Law*, cit., 104-116.

[810] European Court of Justice, decision 13 February 1979, case C-85/76, *Hoffmann-La Roche & Co. AG v. Commission*.

products is concerned.[811] Moreover, the EU judiciary also stated that while performing this task *the competitive conditions and the structure of supply and demand on the market must also be taken into consideration*.[812]

However, the SNNIP test was designed for single-sided markets,[813] and it fits well for 'traditional' product markets, where the price is the main parameter considered. Indeed, as the name and the structure of the test show, this is focused on a small but significant increase in price. It results evident that such a test cannot be used for defining markets characterised by nominal or zero-price products.[814] Also EU Commission Executive Vice-President Vestager affirmed that a test like the SSNIP, *which is linked to changing prices, can't be used with a product that consumers use for free*.[815] Anyhow, shifting to another market definition method may raise concerns about the possibility of delivering less certain and more subjective results.[816] As a consequence, the definition of two-sided and zero-price markets has raised a very interesting scholar debate, analysed below.

First of all, the debate has focused on the opportunity to apply competition rules to markets where products are offered for free. Indeed, companies investigated often sustain that in these markets a transaction does not occur.[817] In particular, according

[811] *Ibidem*, para 28. See also EU General Court, decision 17 December 2003, case T-219/99, *British Airways plc v. Commission*, para 91; EU General Court, decision 15 December 2010, case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs (CEHAR) v. Commission*, para 67.

[812] European Court of Justice, *Michelin*, cit., para 37. See also EU General Court, *British Airways*, cit., para 91; EU General Court, *CEHAR*, cit., para 67.

[813] L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, cit., 295.

[814] European Commission, *Competition Policy for the Digital Era*, cit., 44-45. See also M. Wasastjerna, Competition, *Data and Privacy in the Digital Economy*, cit., 188; D.S. Evans, *Antitrust Economics of Free*, Competition Policy International, 2011, 2, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1813193_code268756.pdf?abstractid=1813193&mirid=1 (accessed 30 June 2021).

[815] European Commission Executive Vice-President Margrethe Vestager, *Defining markets in a new age*, speech delivered at the *Chillin' Competition Conference*, Brussels, 9 December 2019, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en (accessed 28 June 2021).

[816] OECD, *Quality considerations in digital and zero-price markets*, cit., 14.

[817] See the decision by the Northern District of California, delivered on 16 March 2007 in the *Kinderstart.com, LLC v. Google, Inc.* case, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Ca. Mar. 16, 2007). Here the Court sustained that Google did not operate in a market due to the fact that id did not charged a monetary price for its search service. See D.S. Evans, *Antitrust Economics of Free*, cit., 2-3; See also Düsseldorf Higher Regional Court, decision 9 January 2015, *HRS* (Case VI Kart 1/14 (V)), which stated that free-product markets do not exist for antitrust (para 43). As a

to this view, this happens only on the other side of the market (advertisers) which is paying for the product offered for free to the consumers. However, we disagree with this view, because we have showed in-depth how users are paying – and a lot – for the free services offered by platforms. Of course, they are using a different currency, which is not Euro or Dollars, but personal data. Anyhow, stating that this exchange is not a transaction is not correct mainly from a private law perspective. Indeed, we deem proven that a contract occurs between the consumer and the platform. Then, given that the platform is a commercial firm and not a charity, it delivers its product for a profitable aim,[818] as well demonstrated by tech firms' balance sheets and by the profits increases outlined above in this chapter. In particular, the paying side of the platforms is used to subsidise the non-paying one.[819] Consequently, a consideration for this transaction must exist and it is the service provided in exchange of the user's data. The latter are not a coined money, but the raw material that the firm then refine and exchange in the other side of the market, this time in exchange of a monetary consideration. However, once understood this process, it appears to be mistaken from a pure private law perspective not to consider a transaction established under this scheme. This is also demonstrated by evidence suggesting that paid apps appear to gather less data than free ones.[820] Hence, in conclusion of this first step, commercial transactions occur also in these markets and, consequently, competition law shall apply. This approach

consequence, in 2017 the German legislator added the mentioned paragraph 18(2a) to the GWB, thus clarifying that also free-product markets are relevant for antitrust scrutiny.

[818] *Ibidem*, 18. See O. Odudu, *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford University Press, 2006, 35-37; D.S. Evans, *Antitrust Economics of Free*, cit., according to whom *there is no reason why these goods should receive any antitrust exemption through, for example, concluding (as the Kinderstart court did) that there is no relevant antitrust market for a free good* (p. 25). See also M. Sousa Ferro, *'Ceci n'est pas un Marché': Gratuity and Competition Law*, Concurrences, 2015, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3077277_code1769189.pdf?abstractid=2493236&mirid=1 (accessed 30 June 2021), who sustains that for the applicability of competition law is necessary to understand if commercial subsidisation is involved.

[819] European Commission, *Competition Policy for the Digital Era*, cit., 44. L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, cit., 300. Here the Authors point out that *giving away a product for free may be a profit maximizing strategy for a firm, even a monopolist. […] by giving away a product for free, a platform boosts the number of people receiving that product. Although it loses money on one side, it may recover this loss on the other side, making higher profits overall than if it were to sell on both sides at a positive price*.

[820] T. Klosowski, *We Checked 250 iPhone Apps – This Is How They're Tracking You*, The New York Times, 6 May 2021, available at https://www.nytimes.com/wirecutter/blog/how-iphone-apps-track-you/ (accessed 1 November 2021).

is conformed also by section 18(2a), added in June 2017 to the German GWB, which states that *the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge*. Moreover, this appears the interpretation followed also by other Competition Authorities. For instance, a joint paper by the Bundeskartellament and the Austrian Bundeswettbewerbsbehörde stated that although Austrian legislation lacks a provision like section 18(2a) of the German GWB, the wording of the Austrian Competition Act may allow this interpretation.[821]

The next two steps have regard to if these markets shall be defined, and how this exercise may be conducted.

It is necessary to understand that two kinds of two-sided markets have been identified. Reference is made to 'two-sided non transaction markets' when a transaction between the two sides of the market does not occur (although interactions between the two sides may take place, and this aspect shall be considered, as we will see more in-depth below), whilst in 'two-sided transaction markets' a transaction between the two sides of platforms users occurs.[822] According to Filistrucchi, Geradin, van Damme and Affeldt, this distinction is of paramount importance. Indeed, according to these Authors, it is important to understand if there are two markets that need to be defined or only a market that comprehends both its sides. In particular, they sustain that defining only one market has the consequence of having a firm on both sides of the market or none (e.g., the market for payment cards, they made the example of American Express: the transaction occurs between two sides using American Express or without using American Express), whilst if two markets are defined, the consequence is having the platform on one side, but not on the other (e.g., media advertisement market, where, for instance, TV and newspapers are on the same 'attention market' for the

[821] Bundeskartellamt and Bundeswettbewerbsbehörde, *Guidance on Transaction Value Threshold for Mandatory Pre-merger Notification*, 14 May 2018, point 111, available at https://www.bwb.gv.at/fileadmin/user_upload/Veroeffentlichungen/Entwurf_Leitfaden_Transaktionswertschwellen_EN__Konsultationsfassung.pdf (accessed 28 June 2021).

[822] L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, cit., 298; M. Eben and V.H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil*, cit., 12; V.H.S.E. Robertson, *Competition Law's Innovation Factor*, Hart Publishing, 2020, 224.

advertisers, although they are distinct from the users' viewpoint).[823] It is here that the distinction between transaction and non-transaction two-sided markets gains importance. In fact, according to the Authors, in case a non-transaction two-sided market (like online platforms) is concerned, two distinct markets shall be defined. Contrarywise, if reference is made to a transaction two-sided market, only one market shall be defined.[824] From a practical standpoint, they have found that Competition authorities and Courts generally follows this reasoning while dealing with transaction two-sided markets, although they result more bewildered when non-transaction markets are at stake. In particular, in the latter case enforcers tend to define only one market, thus leading to a too narrow market definition.[825] However, the Authors stress the need to take into account the relationships between sides of the market also in non-transaction two-sided markets, for the reason that the competitive forces faced by a firm acting on such a market cannot be properly understood if both sides are not taken into account.[826] On this point, the empirical evidence provided in the article suggests that although enforcers do recognise the influences between the two sides of the market, they do not correctly take into consideration such interrelation, thus leading again to a too narrow market definition result.[827]

However, there are also instances sustaining that the market definition exercise should not be carried out. According to Louis Kaplow, for instance, the market definition process is *useless*.[828] Indeed, this Author sustains that defining a relevant market without prior making an assessment of market power is not coherent. In particular, market definition is seen as an item that do not add more information to the market power estimate calculated at the beginning of the proceeding.[829] As a consequence, he proposes a process based upon the mentioned estimate of market power, which shall then be used to determine the correct legal answer.[830] All the

[823] *Ibidem*, 301.
[824] *Ibidem*, 302.
[825] *Ibidem*, 307-319.
[826] *Ibidem*, 319-322.
[827] *Ibidem*, 322-328.
[828] L. Kaplow, *Why (Ever) Define Markets*, Harvard Law Review, 2010, 124, 442. See also B. Mäihäniemi, *Competition Law and Big Data*, cit., 59.
[829] *Ibidem*, 440. See also V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 58-59.
[830] L. Kaplow, *Why (Ever) Define Markets*, Harvard Law Review, cit., 473.

other steps are *senseless* for the Author, according to which it is to be accepted that *one should never define markets*.[831] However, this position has been criticised, among others, by Authors such as Werden, who sustains that the market definition exercise remains essential in order to understand characteristics, such as entry prospects or the durability of market power, which are relevant in the antitrust assessment of a case.[832]

In case the necessity of defining these markets prevails, a quality-oriented alternative to the abovementioned SSNIP test has been found in the so-called SSNDQ (Small but Significant Non-transitory Decrease in Quality) test.[833] However, the application of this tool must cope with several difficulties of practical nature. In particular, as already anticipated, it may prove difficult to exactly and objectively quantify quality.[834] As noted by the European Commission's Report, *it is unclear how this test could be made operational in practice without a precise measurement of quality that would allow competition authorities and courts to determine an equivalent to a 5-10% price increase*.[835] In is worth pointing out that some parameters for the assessment of quality variations have been enucleated by the OECD and they include the degree of advertising and privacy, the ease of switching to another product, as well as other measures of quality.[836] However, also these proxies may lack the precision (and the consequent predictability) that would be necessary in competition law cases. Some Authors have suggested to substitute the price increase percentage with, for instance, a 25 percent decrease in a quality performance included into the SSNDQ test.[837] The European Commission, while ruling on the *Google Android* case, included some evaluations made on the

[831] *Ibidem*, 474.
[832] G.J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, Antitrust Law Journal, 2012, 78, 729. See also V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 60.
[833] OECD, *The Role and Measurement of Quality in Competition Analysis*, cit., 14-15; I. Lianos, V. Korah, P. Siciliani, Competition Law, cit., 245-246; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?*, cit., 194.
[834] OECD, *Rethinking Antitrust tools for Multi-Sided Platforms*, cit., 48; M. Wasastjerna, Competition, *Data and Privacy in the Digital Economy*, cit., 191-192.
[835] European Commission, *Competition Policy for the Digital Era*, cit., 45.
[836] OECD, *Quality considerations in digital and zero-price markets*, cit., 15-16.
[837] OECD, *The Role and Measurement of Quality in Competition Analysis*, cit., 15. See R. Hartman, D. Teece, W. Mitchell, T. Jorde, *Assessing Market Power in Regimes of Rapid Technological Change*, Industrial and Corporate Change, 1993, 2, 3, 339-340.

principles lying behind the SSNDQ test.[838] However, although the Commission admitted the possibility of relying on these considerations, it did not establish precise criteria and parameters that may render this test workable from a practical enforcement standpoint,[839] although further developments may occur in the near future. Finally, it appears that in this moment the SSNDQ test shall not be considered practically feasible and, consequently, as argued by the OECD, it might now prove better as a conceptual guide than as a daily tool in the hand of enforcers.[840]

In this sense, a possible solution has been identified again by Filistrucchi, Geradin, van Damme and Affeldt, who suggest that the SSNIP test – although with variations considering two-sidedness – may still be employed in two-sided markets. Indeed, the profits earned on one side are linked to the profits on the other one.[841] In particular, they affirm that in two-sided non-transaction markets a rise in profitability shall be checked on both sides of the market. Instead, in two-sided transaction markets it shall be take into account the profitability of the price paid by both parties for the relevant transaction.[842]

In conclusion, and with a certain affinity to the Kaplow's theory outlined above, the right solution may appear the one suggested by the drafters of the European Commission's Report. Indeed, here it is stated that *it should be remembered that the importance of market definition, and the methodologies developed for identifying it, were built for standard goods and services. In the digital world, it is less clear that we can identify well-defined markets. Furthermore, in the case of*

[838] European Commission, *Google Android*, cit., points (*inter alia*) 267,286, 288, 390. See also M. Eben and V.H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil*, cit., 23. Also the U.S. DoJ, in a 2011 merger case (*United States v. Google/ITA Software*, Case 1:11-cv-00688m para 23) adapted the SSNIP test to a small but significant decrease in quality. See V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 256.
[839] M. Eben and V.H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil*, cit., 23.
[840] OECD, *The Role and Measurement of Quality in Competition Analysis*, cit., 15.
[841] In this sense see D.S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, cit., 328-329, where it is stated that *for firms that compete in multi-sided markets, a price change on one side of the market has positive effects on the other sides of the market; the analyst must consider these crossover effects to determine the overall effect of a price change on profits*.
[842] L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, cit., 329-333.

platforms, the interdependence of the markets become a crucial part of the analysis whereas the role of market definition traditionally has been to isolate problems. Therefore, in digital markets less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.[843] And, in a certain sense, this appears to be the direction taken in recent cases decided by the Competition Authorities and also by the newly enacted or proposed reforms to competition rules.

2.5. The impact on the quality of news we receive and on our democracies

After having described the impact of the gatekeeping platforms on our privacy and personal data, it is also important to address another great concern that their business model raise, which is the plurality and the correctness of the information we receive, which, in the end, determines the health of our democracies. Indeed, forms which are so powerful and can exercise such a capillary control over what can be seen on the web, may well also influence in their own favour our perception of the political and the social reality that surrounds us. This, of course, may have a heavy impact on our societies' very foundations, because as the main platforms can influence our shopping habits, they can also play a role in our voting choices. This is a crucial concern for our governments and for competition law because this is the main expression of market power which translates into political power, with all the consequent perils for the health of our democracies.[844] The main platforms – which are also among the firms with the highest market power's rates – might exercise their influence on the political discourse with more and more sophisticated means. In particular, they have the ability to influence the news we receive and upon which we base our political opinions and, consequently, our vote.

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[843] European Commission, *Competition Policy for the Digital Era*, cit., 46.

[844] Written Statement for the Record by M.E. Stucke and A. Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, 18 October 2019, 19, available at https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-20191018-SD010.pdf (accessed 10 June 2021); A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 216; (in a broader sense) I. Lianos, *Competition Law as a Form of Social Regulation*, cit., 76.

The influence that platforms may play in this field is evident if we consider that according to a recent Pew Research Center studies, 53% of U.S. adults get their news from social media 'often' or 'sometimes', whilst 36 percent of Americans regularly get news on Facebook and 23 percent on YouTube.[845] Moreover, the same research affirmed that 88% of U.S. citizens believe that social media exercise some control on the mix of news they receive and 62 percent of them feel that social media have too much control on the news the users receive.[846] In addition, 23 percent of U.S. social media users sustained that social media led them to change opinions on an issue.[847] Other datasets suggest that social media represent the source of news for 48 percent of adults in the U.S., 50 percent in Italy, 39 percent in France and the UK, 57 percent in Spain, until higher percentages such as 64 percent in Hungary, 66 percent in Poland and Hong Kong, and 71 percent in Greece.[848] Finally, it is also interesting to cite that during an 'emotional contagion' study on 689,003 users, Facebook manipulated their emotions by altering the news they received. It is surprising to say that this trial succeeded. In fact, people who received positive news were more positive, whilst people receiving negative news were more negative.[849]

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[845] Pew Research Center, *News Use Across Social Media Platforms in 2020*, 12 January 2021, 4-5, available at https://www.journalism.org/wp-content/uploads/sites/8/2021/01/PJ_2021.01.12_News-and-Social-Media_FINAL.pdf (accessed 9 June 2021).

[846] Pew Research Center, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, 2 October 2019, 2-3, available at https://www.journalism.org/wp-content/uploads/sites/8/2019/09/PJ_2019.09.25_Social-Media-and-News_FINAL.pdf (accessed 9 June 2021). See also P. Suciu, *More Americans Are Getting Their News From Social Media*, Forbes, 11 October 2019, available at https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=2ff8d6553e17 (accessed 9 June 2021).

[847] Pew Research Center, *23% of users in U.S. say social media led them to change views on an issue; some cite Black Lives Matter*, 15 October 2020, available at https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/ (accessed 9 June 2021).

[848] Share of adults who use social media as a source of news in selected countries worldwide as of February 2020, available at https://www.statista.com/statistics/718019/social-media-news-source/ (accessed 9 June 2021).

[849] A. Ezrachi and M.E. Stucke, *Competition Overdose*, cit., 218; A. Ezrachi and M.E. Stucke, *Written Statement for the Record by Maurice E. Stucke and A. Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law*, 18 October 2019, 19, available at https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-20191018-SD010.pdf (accessed 9 June 2021); A.D.I. Kramer, J.E. Guillory, J.T. Hancock, *Experimental evidence of massive-scale emotional contagion through social networks*, Proceedings of the National Academy of Sciences of the United States of America, 111, 24, 2014, 8788, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4066473/pdf/pnas.201320040.pdf (accessed 9 June 2021).

In particular, as brilliantly reported by Ezrachi and Stucke in their submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, social media might influence our views by means of instruments such as bias, censorship and manipulation.[850] In particular, through bias, users may receive information based on their preferences, thus reducing their viewpoints and creating the so-called 'echo chambers', where different and divergent opinions are not considered.[851] Finally, through censorship or manipulation, the platforms might respectively hide or promote news which are in line with its (or others') interests.[852]

Furthermore, the considerations expressed above are also confirmed by the abovementioned ACCC Preliminary Report, according to which the position as 'unavoidable business partners' of platform may also exercise a certain degree of influence on journalism and media independence, by means of exclusionary or ranking decisions. Indeed, according to the ACCC Preliminary Report, *platforms could inhibit the set of choices available to consumers, or inhibit their ability to make informed choices of journalistic content*.[853]

From another perspective, tech platforms cannot only exploit their power directly to influence our ideas, but they can also be used indirectly (and illicitly) by third parties against us. Both possibilities are based upon the market power held by the platforms, because, regardless of the fact this power is exploited directly by them or indirectly by third parties, this is possible because – as seen above – we rely heavily on these platforms for receiving our news. A clear example of what we have introduced here is represented by the 2016 and, at a lesser extent, 2020 U.S. Presidential Elections,[854] when Russia made use of the main U.S. social networks

[850] A. Ezrachi and M.E. Stucke, *Written Statement for the Record by Maurice E. Stucke and A. Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law*, cit., 19.
[851] AGCM and Others, *Indagine conoscitiva sui big data*, cit., 19, 34.
[852] A. Ezrachi and M.E. Stucke, *Written Statement for the Record by Maurice E. Stucke and A. Ezrachi for a hearing before the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law*, cit., 19.
[853] Australian Competition & Consumer Commission, *Digital Platforms Inquiry. Preliminary Report*, cit., 295-296.
[854] S. Frenkel and J.E. Barnes, *Russians Again Targeting Americans With Disinformation, Facebook and Twitter Say*, The New York Times, 1 September 2020, available at https://www.nytimes.com/2020/09/01/technology/facebook-russia-disinformation-election.html

with the aim of influencing the Presidential debate. In order to achieve this result, according to the F.B.I., fake user accounts were created.[855] Just to contextualise this threat, Facebook officials told the Congress that the 2016 campaign reached more than a hundred million Americans on Facebook and Instagram.[856]

All the reasons reported above show again how a different and more effective application of competition rules and tools ought to be reached. The impact on the news we receive and on the health of our democracies might be led back to the discourse about quality, although, finally, it might be treated directly under a structuralist approach, as it is a direct by-product of the excessive market power held by tech giants.

2.6. Innovation and digital markets' competition law analysis

Another aspect of paramount importance that shall be taken into account in the evaluation of conducts occurring in digital markets is innovation, which can be assessed only by means of a dynamic approach to competition law. This point was raised also by former European Commission's Director-General for Competition Laitenberger, who stated that in digital markets there is a strong focus on parameters such as quality, choice and innovation.[857] Furthermore, he pointed out that the consumer welfare standard supported by the Commission *includes a dynamic*

(accessed 9 June 2021); J. Stubbs, *Facebook says Russian influence campaign targeted left-wing voters in U.S., UK*, Reuters, 15 September 2020, available at https://www.reuters.com/article/usa-election-facebook-russia-idUSKBN25S5UC (accessed 9 June 2021).

[855] *Ibidem*.

[856] C. Timberg and T. Romm, *New report on Russian disinformation, prepared for the Senate, shows the operation's scale and sweep*, The Washington Post, 17 December 2018, available at https://www.washingtonpost.com/technology/2018/12/16/new-report-russian-disinformation-prepared-senate-shows-operations-scale-sweep/ (accessed 9 June 2021); *Russia 'meddled in all big social media' around US election*, BBC News, 17 December 2018, available at https://www.bbc.com/news/technology-46590890 (accessed 9 June 2021).

[857] Former Director-General for Competition Johannes Laitenberger, *EU competition law in innovation and digital markets: fairness and the consumer welfare perspective*, speech delivered at MLex / Hogan Lovells event, Brussels, 10 October 2017, available at https://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.

perspective, which takes into account longer-term effects and potential effects,[858] which are commonly linked to innovation.

Innovation thus represents a key feature in the digital environment, but a more technical analysis is needed in order to understand its impact and its drawbacks, as well. First of all, the theoretical concept of innovation in competition has stimulated a very interesting scholar production, which can be summarised in the models elaborated, respectively, by Joseph Schumpeter[859] and Nobel Prize for economics winner Kenneth Arrow.[860] In particular, the interplay between innovation and market concentration is central in understanding such theories. According to the Schumpeterian view (referred as Austrian School, which also includes Hayek[861]), the perfect competition model[862] cannot account for the provision of more innovation.[863] As noted by Gilbert, in Schumpeter's view pricing these products at their marginal cost or close to it cannot generate the necessary return to justify the necessary R&D investments.[864] Key in this approach is the concept of 'dynamic competition', viewed as a form of competition based on innovation and aimed at producing new products while reducing prices, thus providing consumer welfare and invigorating economic progress.[865] Moreover, this method does not fear market concentration, which, on the contrary, is seen as a condition which can deliver more innovation, in a way similar to the opinion delivered by Justice Scalia in the *Trinko* case.[866] In fact, concentration and the perspective of dominance are the drivers that

[858] *Ibidem*. It is also worth pointing out that former Director-General Laitenberger – in accordance with our suggestions expressed in chapter 4 – during this speech affirmed that also from the mentioned dynamic perspective, *the best way to preserve competition is to maintain what the European Court of Justice calls "competition as process", "competition as such", or the benefits of competitive "pressure"*.
[859] J. Schumpeter, *Capitalism, Socialism and Democracy*, Harper & Brothers, 1947.
[860] K.J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in National Bureau of Economic Research, *The Rate and Direction of Inventive Activities: Economic and Social Factors*, Princeton university Press, 1962.
[861] F.A. Hayek, *Individualism and Economic Order*, Routledge, 1949.
[862] Referring to a situation in which buyers and sellers are so numerous and informed that monopolies are absent and the market price of a good is established by the market itself, beyond the influence of both sellers and consumers. The equilibrium price is equal to the production marginal cost. See A. Frignani and S. Bariatti, *Disciplina della Concorrenza nella UE*, cit., 3-4.
[863] R.J. Gilbert, *Innovation Matters*, cit., 42-43.
[864] *Ibidem*., 43.
[865] J.G. Sidak and D.J. Teece, *Dynamic Competition in Antitrust Law*, Journal of Competition Law & Economics, 2009, 5, 4, 600; R.J. Gilbert, *Innovation Matters*, cit., 43.
[866] V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 79.

stimulate a firm to innovate, because it allows to internalise the rewards arising out from innovation efforts.[867] Moreover, large firms are considered more capable of financing R&D.[868] Schumpeter itself viewed its theory of competition as a 'creative destruction', which allow new and innovative products to replace older ones, thus generating social welfare.[869] In particular, according to the Schumpeterian view, this process constitutes a continuous threat to the dominant firm's position, because a new innovative 'creation' will always come with the effect of displacing the previous dominant technology. However, although we shall recognise this theory's undoubted theoretical charm,[870] it is also necessary to acknowledge that this scheme might have worked for the 'old economy' (and not for all its sectors), but it appears unable to deal with the digital environment characterised by the importance of data and by strong network effects, together with all the related behavioural biases we addressed above.

Contrarywise, the theory sustained by Arrow focus on the need for a functioning competitive process instead of market concentration in order to deliver innovation.[871] In fact, competitive pressure is seen as the driver for innovation, whilst monopoly positions may lead firms to invest less in innovative processes, since they are not incentivised in doing it (the so-called 'Arrow effect' or 'replacement effect').[872] In a nutshell, the monopolist earns its profits from the technology that the possible innovation would replace.[873] Moreover, the eventual non monopolist firm in a competitive market will be incentivised in investing, as the new technology does not represent a risk to its position.[874]

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[867] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 10.
[868] J.B. Baker, *Beyond Schumpeter vs. Arrow: Antitrust Fosters Innovation*, Antitrust Law Journal, 2007, 74, 578.
[869] V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 79.
[870] R.J. Gilbert and A.D. Melamed, *Innovation Under Section 2 of the Sherman Act*, Antitrust Law Journal, forthcoming, 2021, 5, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3859511_code2069823.pdf?abstractid=3818303&mirid=1 (accessed 2 July 2021). See also United States Court of Appeals, District of Columbia Circuit, decision 28 June 2001, *United States of America v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001), at 49-50.
[871] *Ibidem*, 79-80. A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 11.
[872] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 11; J.B. Baker, *Beyond Schumpeter vs. Arrow: Antitrust Fosters Innovation*, cit., 578.
[873] R.J. Gilbert, *Innovation Matters*, cit., 46.
[874] *Ibidem*.

However, the relationship between competition and innovation is much more complex and a correct analysis of this phenomenon lies in a compromise position between the Schumpeterian and the Arrowian theories. Indeed, as pointed out by Aghion, Bloom, Blundell, Griffith and Howell, this relationship can be exemplified with an inverted U-shape, where an increase in the competitive level may deliver more innovation, but an excess of competition may provide the contrary effect.[875] The mentioned compromise position has been advanced by Carl Shapiro,[876] and then also by the European Commission.[877] This point of convergence relies upon three principles, which are a. *contestability* of markets, in order to let innovation to stem; b. *appropriability*, defined as *the extent to which a firm can capture the value created by its innovation and protect the competitive advantage associated with it*, and c. *synergies*, which can arise, for instance, by R&D activities.[878] However, Professor Baker, more along Arrowian lines, warned that relaxing antitrust rules on the rationale that one firm is enough for competition, in rapidly changing high-technology markets or otherwise would undermine innovation incentives under the guise of protecting them.[879]

This discussion is central in digital markets, because, for instance, if the Schumpeterian view shall be endorsed, the market power of digital platforms is seen as transitory (a sort of 'competition a click away' approach), without any negative impact on the degree of innovation. Furthermore, in this scenario, the threat of losing its dominant position might drive the monopolist to increasingly innovate in order to defeat other firms' competition.[880] However, as we have already seen, this view does not take into account some inner features of digital markets, such as barriers to entry stemming from the crucial role of big data,[881] together with

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[875] P. Aghion, N. Bloom, R. Blundell, R. Griffith, P. Howitt, *Competition and Innovation: An Inverted-U Relationship*, The Quarterly Journal of Economics, 2005, 120, 2, 701.
[876] C. Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in J. Lerner and S. Stern (Eds.), *The Rate and Direction of Inventive Activity Revisited*, The University of Chicago Press, 2012, 361-410.
[877] European Commission, policy brief, *EU merger control and innovation*, April 2016, available at https://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf (accessed 29 June 2021).
[878] *Ibidem*, 2.
[879] J.B. Baker, *Taking the Error out of Error Cost Analysis: What's Wrong with Antitrust's Right*, Antitrust Law Journal, 2015, 80, 1, 14.
[880] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 10-11.
[881] These dynamics, in a positive feedback loop, *make the strong get stronger and the weak get weaker*. See OECD, *Data-Driven Innovation. Big Data for Growth and Well-Being*, 2015, 107,

the gatekeeper position held by dominant firms. As results, it is crucial to understand the correct role that innovation and concentration shall play in the competitive assessment of cases involving digital markets.

According to the OECD, market concentration in a digitalised economy represents an obstacle to innovation[882] and the same Organisation has found that entry levels have decreased in the last years both in ICT-manufacturing and ICT-using sectors.[883] This datum is also emphasised by a U.S. Council of Economic Advisers report which stated the business creation index has decreased whilst top firms have expanded their market position.[884]

As sustained by Ezrachi and Stucke, a key role in this field is played by the so-called competitive portals, which Competition Authorities shall keep open.[885] The fact that, due to the characteristics enlisted above, digital markets have the tendency to tip and to run towards winner-takes-all dynamics, means that these markets deserve great attention and need a stronger competition enforcement, supported also by behavioural and structural remedies, with the last resort represented by firms' divestiture or break-up. The positive impact of such remedies on innovation (or of their perspective) is well exemplified by the cases brought against AT&T and IBM analysed in chapter 3.[886] Indeed, as we have already mentioned, precisely these cases helped keeping the competitive portals open and allowing firms like Microsoft to emerge.

In maintaining competitive portals open a crucial role is played by the concept of potential competition.[887] This concept is interrelated to the market definition

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quoting C. Shapiro and H. Varian, *Information Rules: A Strategic Guide to Information Economy*, Harvard Business Press, 1999, 175. See also A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 25-27, 34. Coherently, see OECD, *Supporting Investments in Knowledge Capital, Growth and Innovation*, cit., 170.

[882] OECD, *OECD Digital Economy Outlook 2020*, 2020, 21.

[883] OECD, *OECD Digital Economy Outlook 2017*, 2017, 199-200.

[884] J. Furman, Chairman, Council of Economic Adviser, *Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth*, 16 September 2016, 4-5, available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf (accessed 29 June 2021). See also A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 15-16.

[885] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 31-34.

[886] *Ibidem*, 31-32; M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 284.

[887] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, published

exercise analysed above, as, according to Robertson and to the European Commission practice, its assessment shall be carried out after the relevant market has been defined.[888] Potential competition is related to market entry, and it has also been recognised by the EU judiciary practice. Indeed, while ruling the *Delimitis* case, the Court of Justice held that it was necessary to examine if a new competitor would have had *real concrete possibilities* to enter the market.[889] Also the General Court, in the *Visa* decision, ruled accordingly to the *Delimitis* decision and specified that this entry shall occur *with sufficient speed to form a constraint on market participants*.[890] The Commission, as well, stressed that the term 'competitors' includes both actual and potential ones.[891] However, in line with the EU judiciary, the Commission held that potential market entry has to be plausible and not only possible,[892] whilst the timeframe in which it shall occur ought to be evaluated on a case-by-case basis.[893]

Together with the analysis of potential competition, Competition Authorities shall also assess the so-called 'competition innovation', which, according to Robertson, is *the competitive process between companies that are striving to bring interchangeable new products or processes on the market*.[894] In its decisional practice, the Commission took into account this profile especially in merger assessment.[895] A telling example is provided by the merger denial decision issued

on the OJ of the EU 14 January 2011, C 11/1, point 118, where it is expressly stated that *in technology markets, particular emphasis must be placed on potential competition*. See also V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 135.

[888] V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 131, 136. See also Commission Notice on the definition of relevant market for the purposes of Community competition law, point 24.

[889] ECJ, *Delimitis*, cit., para 21.

[890] EU General Court, decision 14 April 2011, *Visa Europe Ltd and Visa Internationsl Service v. Commission*, paras 166, 189.

[891] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, cit., point 10.

[892] *Ibidem*.

[893] *Ibidem*, see footnote 6. See also V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 134.

[894] V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 147.

[895] In particular, the Author stresses that this element should not be incorporated in the market definition exercise at any cost, because it would also add an element of uncertainty. However, she suggests that is should play a prominent role in the substantive competitive assessment. See V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 152.

in respect of Alstom and Siemens in 2019.[896] Here the Commission was worried that the consolidation would have lessened the degree of competition in the high-speed trains' rail signalling sector, thus stifling innovation.[897]

Another suggestion to account correctly for innovation in competition law analysis comes from Richard J. Gilbert, who proposed a new market definition paradigm based upon R&D incentives.[898] In detail, he stated that standard market definition cannot be helpful in investigating harm to innovation, because R&D is not traded. He then proposed a 'research and development market' to be analysed in the context of antitrust investigations.[899] According to the Author, this tool will account for incentives in innovating by *identifying the firms with the specialized assets necessary to conduct R&D devoted to a particular application*.[900] Moreover, the same Author, together with Melamed, provided for a rebuttable presumption of harm to innovation based on a firms' monopoly power in the R&D market (together with considerations about market power in the related product market in case of coincident market innovation).[901] Such a presumption can be rebutted by proving that the discussed conduct is necessary in order to increase incentives to innovate.[902] Anyhow, although this approach might be endorsed from a theoretical standpoint, a concern arises with regard to the nature of innovation. Indeed, as we will analyse now, innovation might not be always good and healthy. Therefore, competition assessment of cases shall take innovation and R&D into account, but without missing the impact that the conduct at stake – although innovation friendly – may have on the broader market structure and on users' welfare.

Even if taking innovation into consideration plays a paramount role in the digital arena, we need to understand that more kinds of innovation exist and that innovation

[896] European Commission, decision 6 February 2019, case M.8677 – *Siemens/Alstom*.
[897] V.H.S.E. Robertson, *Competition Law's Innovation Factor*, cit., 150.
[898] R.J. Gilbert, *Innovation Matters*, cit., 236.
[899] *Ibidem*.
[900] *Ibidem*.
[901] R.J. Gilbert and A.D. Melamed, *Innovation Under Section 2 of the Sherman Act*, Antitrust Law Journal, cit., 38-40, 44. Coincident market innovation is defined as *innovations that are likely to be commercialized in a product market in which the potential innovator or its customer or licensee for the innovation has profits at risk from the innovation* (p. 8).
[902] *Ibidem*.

must not be elevated to an end in itself.[903] As sustained by Ezrachi and Stucke, innovation can also have a negative side, which can have a. an *exclusionary* nature, when it is directed at pushing 'as-efficient' competitors out of the market; b. a *cannibalistic* component, when it aims at reducing competitors' innovation incentives, and c. an *exploitative* temper, when its objective is consumers' exploitation.[904] As a consequence, a positive form of innovation may be pursued. As the Authors pointed out, this would require an omni comprehensive policy approach, and also the quality of regulation has to play a role. Indeed, establishing very strict rule may end up favouring large firms which have the resources to comply with them.[905] Ezrachi and Stucke thus suggest a multi-faceted approach, in which competition law shall play both an *ex-post* role, by sanctioning abuses of dominant position and allow the flow of data necessary for innovation and for keeping competitive markets open. and an *ex-ante* role, represented mainly by a merger enforcement which prevents companies to foreclose competition by gaining excessive market power. Moreover, other policy fields, such as data protection or consumer law, shall play a role.[906] The result would be a policy level playing field aimed at promoting the social values lying at the basis of our societies, thus not stifling positive efficiencies, *noble competition*[907] and welfare-enhancing innovation.

In order to reach this target, however, the enactment of new rules - together with innovative interpretation of the existing ones - appears to be necessary.

PART II – THE NEED FOR A *MULTI-TOOL* ENFORCEMENT STRATEGY IN DIGITAL MARKETS

Solutions to the issues analysed in the previous part may rely first on a renewed approach to competition rules, as done recently by almost all the European

[903] A. Ezrachi and M.E. Stucke, *Digitalisation and its impact on innovation*, cit., 52-53.
[904] *Ibidem*, 53-54.
[905] *Ibidem*, 64.
[906] *Ibidem*, 65-81.
[907] A. Ezrachi and M.E. Stucke, *Competition Overdose, cit.*, 255-259.

Competition Authorities. In the U.S., as well, a change of paradigm towards an innovative approach to competition issues posed by tech giants was started thanks to Lina Khan's appointment as head of the FTC. In particular, in the memorandum released on 22 September 2021,[908] the new FTC Chair outlined that the Agency shall focus *on structural incentives that enable unlawful conduct – be it certain conflicts of interest, business models, or structural dominance – as well as looking upstream at the firms that are enabling and profiting from this conduct. Focusing enforcement efforts towards targeting and rectifying root causes can avoid a whack-a-mole approach that imposes significant enforcement burden with few long-term benefits*.[909] Moreover, Chair Khan stressed that *market power now looks to be an increasingly systemic problem across the economy, so we should generally focus our resources on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans*.[910] In particular, she plainly affirmed the necessity to prioritise the Agency's efforts on *dominant intermediaries and extractive business models*.[911]

The fact that we are in front of a possible significant change of policy appears confirmed also by Amazon's reaction to Khan's appointment. In fact, the firm tried to seek recusation of the new FTC's head in investigations involving Amazon, due to the positions she expressed in her article *Amazon Antitrust Paradox*.[912]

However, apart from policy statements by Competition Authorities' chairs, the real changes will be brought by the enactment of provisions introducing new tools in

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[908] U.S. Federal Trade Commission, Chair Lina M. Khan, *Memorandum on Vision and Priorities for the FTC*, 22 September 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (accessed 24 September 2021). See also L. Feiner, *FTC Chair Lina Khan outlines new vision for antitrust enforcement, consumer protection*, CNBC, 23 September 2021, available at https://www.cnbc.com/amp/2021/09/23/ftc-chair-khan-outlines-vision-for-antitrust-enforcement-consumer-protection.html (accessed 24 September 2021).

[909] U.S. Federal Trade Commission, Chair Lina M. Khan, *Memorandum on Vision and Priorities for the FTC*, cit., 2.

[910] *Ibidem*.

[911] *Ibidem*, 3.

[912] D. Lee, *Amazon calls for FTC chair Lina Khan to step aside from investigations*, Financial Times, 30 June 2021, available at https://www.ft.com/content/943450a4-dbdc-48aa-a160-a86c3692c734 (accessed 1 July 2021); B. Kendall, *Amazon Seeks Recusal of FTC Chairwoman Lina Khan in Antitrust Investigations of Company*, The Wall Street Journal, 30 June 2021, available at https://www.wsj.com/articles/amazon-seeks-recusal-of-ftc-chairwoman-lina-khan-in-antitrust-investigations-of-company-11625067962 (accessed 1 July 2021).

the availability of competition enforcers. This happened in Germany with the amendment which added Section 19a to the GWB and it is expected also in Italy and at the EU level. However, not only new tools are needed, but innovative interpretation of the existing rules might result necessary, as well. This part will analyse both these lines of intervention.

1. Current competition rules under a new light against tech giants

As a starting point, it is worth scrutinising how existing competition rules and theories might be interpreted in order to be effective vis-à-vis tech giants.

1.1. The 'special responsibility' of dominant firms

According to EU competition law, it is held that dominant firms have a 'special responsibility' towards the market.[913] This responsibility requires them not to impair the competitive process as a consequence of their powerful position. In particular, they are called to behave correctly and not to exclude competitors by means of other reasons than competition on the merits.[914] As a consequence, these firms might theoretically have a duty not to impair competition and this duty might be strengthened by means of the peculiar traits – analysed above – characterising data-driven markets.

The existence of such a responsibility may also constitute the theoretical basis for the enactment of provisions establishing *ex ante – i.e.*, after having defined which

[913] ECJ, *Michelin*, cit., para 57, where the Court stated that *a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*. See also, *inter alia*, the already quoted affirmation by European Commission Executive Vice-President Margrethe Vestager, *Statement by Commissioner Vestager on Commission decision to fine Qualcomm for engaging in predatory pricing*, cit., where she stated that *dominant companies have a special responsibility not to impair competition in the internal market. They can sell at low prices but cannot sell below cost with the intention of eliminating a competitor. This is not competition on the merits*. I. Lianos, V. Korah, P. Siciliani, *Competition Law*, cit., 895-898. See also W. Sauter, *A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law*, Journal of Antitrust Enforcement, 2019, 0, 1.
[914] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 279.

firms shall be considered as 'gatekeepers' – the behaviours capable of infringing the mentioned special responsibility and, at a broader extent, competition as such. This appears to be the rationale lying behind both the 2021 German amendment to the GWB and the EU's DMA Regulation, which will be analysed below in this part.

1.2. The essential facility doctrine

A solution to the problems raised by digitalisation based on existing rules might be found in a renewed interpretation of the so-called 'essential facility doctrine'. The essential facility doctrine was first elaborated in the U.S. antitrust context. A first example of this interpretation can be found in the 1912 U.S. Supreme Court *Terminal Railroad* judgement.[915] In this case, the Court imposed a duty on certain railroad companies to grant access to other competing companies to some bridges owned by the former across the Mississippi river. In fact, without the possibility to use these bridges, the competing companies could not offer their services.[916] This theory was then expanded, although under particular circumstances, in the *Aspen Skiing* decision.[917] Here the Supreme Court held that a refusal to deal by dominant firms might be deemed unlawful if it makes important changes to the pattern of distribution.[918] However, this theory's expansion suffered a setback with the already mentioned *Trinko* ruling in 2004.[919]

[915] U.S. Supreme Court, decision 22 April 1912, *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).
[916] I. Graef, *Rethinking the Essential Facility Doctrine for the EU Digital Economy*, TILEC Discussion Paper DP 2019-028, April 2019, 1, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3504703_code524065.pdf?abstractid=3371457&mirid=1 (accessed 30 June 2021); D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 97.
[917] U.S. Supreme Court, decision 19 June 1985, *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985).
[918] D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 97.
[919] *Ibidem*, 97-98. See also A. Frignani and S. Bariatti, *La disciplina della concorrenza nella UE*, cit., 319.

In the EU this figure is better known as 'refusal to deal'.[920] The most important ECJ precedents in this context are represented by the *Magill*[921] and *Bronner* cases. In particular, in the latter decision, the Court of Justice established the conditions according to which a refusal to deal by a dominant company amounts to an infringement of Article 102 TFEU. This case might be symbolic for our purposes. Indeed, Bronner, a small publisher, requested the access to a home-delivery service for newspapers owned by Mediaprint, which refused. Bronner sustained that Mediaprint's service was essential for its activity. At this purpose, the Court held that the refusal needs to be unjustified and capable of eliminating all competition on the part of the subject requesting the access.[922] Moreover, the infrastructure object of the access request must be essential, with the meaning that no other services can substitute the requested one.[923] The Court thus ruled against Bronner, because the home-delivery service requested by Bronner to Mediaprint, although being important for the former, was not essential for the running of its business as the Court did not found impossible or excessively difficult for Bronner to find another solution with regard to the home-delivery service at stake.[924]

The above reported case might suggest some parallelisms with the data-driven markets, but it also differs regarding the very characteristics of the market concerned. Indeed, Bronner was a small publisher, and it would have found difficult to establish its own home-delivery service. Anyhow, this task, as stated by the ECJ, was not impossible or excessively difficult. The parallelism between this case and the digital markets may be twofold: From a first standpoint we can observe that small entrants in the digital economy may benefit from the access to, for instance, Google's dataset. On the contrary, and this is our second prong, it could be argued

[920] In its decision 21 December 1993, case IV/34.689 – *Sea Containers v. Stena Sealink*, published in the OJ of the EU 18 January 1994, L 15/8, the European Commission affirmed that *the owner of an essential facility which uses its power in one market in order to protect of strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86* (para 66). Moreover, it was stated that *this principle applies when the competitor seeking access to the essential facilities is a new entrant into the relevant market* (para 67).
[921] European Court of Justice, decision 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (Magill)*.
[922] ECJ, *Bronner*, cit., para 41.
[923] *Ibidem*.
[924] *Ibidem*, paras 43-46.

that they can organise their own data collection and processing services also by merging more small firms' forces together. This point is crucial, because it marks also the difference from the *Bronner* decision. Indeed, as explained by Advocate General Jacob's opinion for the *Bronner* case, giving access to the incumbent infrastructure, if it is not indispensable, might lessen the dominant firm's incentive to invest, because it would lose part of these investments, but it would also stifle the smaller firm's incentive to innovate, because, if they use the incumbent's facility, they do not need to build their one.[925] In light of what we have analysed in the course of this chapter, the difference between this case and an hypothetical case regarding the digital economy is evident. Indeed, although it is important to recognise the incumbent firms' investments and stimulate the entrants' ones, the structure of data-driven markets would never allow entrants to reach the critical mass needed to compete with tech giants. As pointed out in the joint report by the Autorité de la Concurrence and the Bundeskartellamt, given the abovementioned ECJ jurisprudence, a refusal to deal in a data-drive context could amount to an anticompetitive behaviour only if the data held by the incumbent are unique and necessary for the new entrant's activities.[926] Furthermore, as correctly explained by the same report, a forced data sharing obligation may – curiously – raise concerns over users' privacy. In fact, their data would be exchanged automatically, without their prior consent.[927] Of course, in case such an obligation would be implemented, this information, together with the explanation that it is needed for enhancing competition, may be added to privacy policies (with all the analysed drawbacks that this system implies). This idea might find a practical implementation by means of the so-called 'data-lockers', which are a sort of repository offered by some firms to users, where the latter may upload and manage the data they would like to share.

[925] Conclusion delivered by AG Jacobs on 28 May 1998 for the *Bronner* case, para 57.
[926] Autorité de la Concurrence and Bundeskartellamt, *Competition Law and Data*, cit., 17-18. See also D. Geradin and M. Kuschewsky, *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, 2013, 15, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2216088_code362710.pdf?abstractid=2216088&mirid=1 (accessed 30 July 2021).
[927] Autorité de la Concurrence and Bundeskartellamt, *Competition Law and Data*, cit., 18. See also D.S. Tucker and H. Wellford, *Big Mistakes Regarding Big Data*, The Antitrust Source, 2014, 11, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2549044_code1049464.pdf?abstractid=2549044&mirid=1 (accessed 30 June 2021).

When these data are sold, the user receives a percentage of the transaction.[928] This system appears to draw a sort of equilibrium between competition and privacy concerns. However, by now, it shall be implemented more on large scale and it is still not capable of solving the current market power problem.

However, the interest towards the essential facility doctrine shaped for digital markets has attracted the attention of both scholars and competition law enforcers. At this purpose the current European Commission's Director-General for Competition Olivier Guersent, during a hearing before the French Senate, declared that platforms share some common characteristics with great public facilities and that they may be considered as such, thus transposing the public facilities rules. Anyhow, he specified that it is too early to be more precise on this point, although this is the direction that shall be pursued.[929] Moreover, Executive Vice-President Vestager, in response to a question before the European Parliament, specified that *there can be no general approach of applying the so-called essential facility doctrine to digital platforms. The Commission applies the relevant theory of harm and the corresponding substantive test, based on the specific circumstances of each case, having regard to the specific conduct at stake and its economic context. The essential facility doctrine is just one of the possible theories of harm which the Commission can apply, notably when assessing the legality of a conduct consisting in a refusal to give access to a facility, which is deemed to be essential*.[930]

According to Inge Graef, the European Commission imposed *essential facilities-alike remedies* in the analysed *Google Search* and *Google Android* cases, however

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[928] M. Wasastjerna, Competition, *Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?*, cit., 198.

[929] European Commission Director-General for Competition Olivier Guersent, hearing before the French *Sénat*, 29 January 2020, available at http://www.senat.fr/compte-rendu-commissions/20200127/eco.html#toc4 (accessed 30 June 2021). During this hearing, Director-General Guersent precised that *je vous ai parlé tout à l'heure de la régulation des grandes infrastructures publiques. Les plateformes en présentent beaucoup de caractéristiques. En fait, on peut tout à fait les considérer comme des infrastructures, tirer des leçons de la pratique passée en la matière et les transposer. Il existe un certain nombre des pistes. Il est trop tôt pour être beaucoup plus précis. Nous y travaillons ensemble pour le moment, mais c'est certainement dans cette direction qu'il faut aller* (French version, the speech has been summarised in English in the main text).

[930] European Commission Executive Vice-President Margrethe Vestager, Parliamentary questions, Answer given by Executive Vice-President Vestager on behalf of the European Commission, 31 March 2020, available at https://www.europarl.europa.eu/doceo/document/E-9-2020-000595-ASW_EN.html (accessed 30 June 2021).

under the lower standards of tying and non-discrimination.[931] This has been done to overcome the above reported hurdles required to succeed in a case based upon the essential facility doctrine. The Author considered this approach as not desirable[932] and, consequently, proposed the reform she deem necessary in order to build an essential facility doctrine fit for the digital environment. Among other proposals, she called for a change in the exclusion of effective competition requirement. In detail, she argues that this prerequisite should be considered fulfilled also in case the incumbent is not active in the market the new entrant wants to come into. This reasoning is based on the interlocked nature of digital markets due to network effects and, in particular, by reasons of the role played by data that the incumbent could possess and that might be needed for the new entrant's activity.[933]

1.3. A worthwhile aid: New theoretical instruments

In addition to innovative interpretation of existing rules and theories, a theoretical shift might also appear needed in the competition law analysis of cases involving tech giants: For instance, an increased reliance on behavioural economics in order to better understand consumers' and firms' behaviours in the complex digital market environment may prove helpful in order to reach a mature approach to digital markets while assessing competition law cases. As noted by Stucke and Grunes, *behavioral economics can today be regarded even as part of 'mainstream' economics*.[934] Consequently, these means are particularly needed, with the aim of enriching competition law's 'old goals' (both social and economic) with 'new tools'.

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[931] I. Graef, *Rethinking the Essential Facility Doctrine for the EU Digital Economy*, cit., 12. This point was accurately analysed in 2.1.1. of the present chapter, also in light of the recent judgement delivered by the General Court.
[932] *Ibidem*, 12-13.
[933] *Ibidem*, 20-21.
[934] M.E. Stucke and A.P. Grunes, *Big Data and Competition Policy*, cit., 201. See also B. Mäihäniemi, *Competition Law and Big Data*, cit., 6; M. Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?*, cit., 191, 200-203; M.E. Stucke, *What is competition?*, in D. Zimmer (Ed.), *The Goals of Competition Law*, Edward Elgar, 2012, 52.

1.4. Competition Authorities' contribution: Ongoing investigations into big tech firms

For the sake of completeness, before analysing the legislative innovations that have been recently introduced or that are likely to be enacted, we deem appropriate eliciting the state of the art related to ongoing investigations by competition Authorities into tech firms. In fact, all the tech giants are now under strict scrutiny, in particular from the European Commission and the German Bundeskartellamt.

At the EU level, on 10 November 2020 the Commission sent a statement of objections to Amazon for the use of independent sellers' data and also opened an investigation into Amazon's e-commerce practices.[935] With specific regard to the first prong, the Commission contested exactly Amazon's practice of using independent sellers' data to its advantage in the retail business, where it competes with these sellers. The second concern about Amazon regards the preferential treatment granted to Amazon's own offers and to these sellers which have an agreement in place with Amazon for logistics services.

More recently, the Commission started an investigation on Facebook and Google, as well, came again under the European watchdog's lens. Having regard to Facebook, the Commission announced its investigation on 4 June 2021, aiming at understanding if the social network violated competition rules by using data gathered from advertisers (which promote their products and services via Facebook) in order to compete with them, with specific focus to the online classified ads market.[936] Interestingly, an investigation against Facebook was launched on the same day also by the UK's Competition and Markets Authority and the Commission stated that it will work closely with the UK's Authority.[937] We deem

[935] European Commission, *Antitrust: Commission sends Statement of Objections to Amazon for the use on non-public independent seller data and opens second investigation into its e-commerce business practices*, 10 November 2020, available at https://ec.europa.eu/commission/presscorner/detail/it/ip_20_2077 (accessed 22 July 2021).
[936] European Commission, *Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook*, 4 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848 (accessed 22 July 2021).
[937] Competition and Markets Authority, *Investigation into Facebook's use of data*, 4 June 2021, available at https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data (accessed 22 July 2021).

these synergies welcome in order to better understand digital markets and find effective enforcement solutions.

Having regard to Google we have anticipated before that the Commission opened investigation on 22 June 2021, with a particular focus on the online advertising technology market.[938] In particular, the Commission is willing to assess if Google illicitly favoured its own online display advertising technology services in the 'ad tech' supply chain (where publishers fund free online content for consumers through online display advertising). Of course, these conducts may end in harming service providers competing with Google, advertisers and online publishers. Data will also play a significant role in such investigation, as the Commission will scrutinise whether Google is keeping for itself users' data useful for advertising purposes. As anticipated, it is relevant that the Commission highlighted that it will take into account the need to protect users' privacy through instruments such as the GDPR. In this light, the decision of the ECJ on the Landsgericht Düsseldorf's referral will of course be decisive for the outcome of such probe.

At the national level, the most 'active' Authority appears to be the German Bundeskartellamt. The German Authority is without doubt supported by the recent introduction of Section 19a of the GWB, which, as we will see just below, grants the Bundeskartellamt itself with more powers. Without waiting much time after the entry into force of these new rules, occurred on 19 January 2021, the German Authority started investigations (under the new Section 19a of the GWB) against Apple, Google, Facebook and Amazon.[939] The first investigation under the new regime was started early on 28 January 2021, in order to seek applicability of the new tool to the previous *Facebook/Oculus* case.[940] Another probe was started on 18 May 2021 against Amazon and it is directed at understanding if Amazon's

[938] European Commission, *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, 22 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143 (accessed 22 July 2021).
[939] M. Gassmann, *Mit neuen Waffen gegen Big Tech*, Welt, 23 June 2021, available at https://www.welt.de/wirtschaft/article232039683/Bundeskartellamt-Mit-neuen-Waffen-gegen-Facebook-Google-Amazon-und-Apple.html (accessed 22 July 2021).
[940] Bundeskartellamt, *First proceeding based on new rules for digital companies – Bundeskartellamt also assesses new Section 19a GWB in its Facebook/Oculus case*, 28 January 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html?nn=3591568 (accessed 22 July 2021).

ecosystem is of paramount importance also in adjacent markets, and in case of affirmative answer the Authority is determined to take early action in order to prohibit possible unlawful conducts by Amazon.[941] It is worth noting that Amazon is under scrutiny by the Bundeskartellamt also in other two proceedings, however not based upon the newly introduced powers. The Authority is evidently seeking an extensive application of its new 'weapon' and it started investigations, like the Amazon one, to assess if it is applicable with respect of all the big tech players. With reference to Google, the proceeding was announced on 25 May 2021, and it is aimed also at scrutinising Google's data protection terms (like the Authority did in 2019 with Facebook).[942] The probe towards Apple was announced on 21 June 2021 and, like the others, it will determine if Apple is a player of paramount importance across markets. In case of affirmative answer, specific conducts (also regarding the analysed role of developers in the App Store environment), object of several complaints to the Authority, will be analysed.[943]

Something is moving against big techs – and apparently fast – also on the other side of the Atlantic Ocean. We have already reported about the lawsuit launched against Google by 36 State Attorneys General in 2021. Moreover, on 20 October 2020 the Department of Justice, together with eleven State Attorneys General filed a lawsuit against Google before the U.S. District Court for the District of Columbia. The aim of this action is to seek sanctions against Google for its monopolisation practices in the search and search advertising markets.[944] In addition, on 9 December 2020 the

[941] Bundeskartellamt, *Proceedings against Amazon based on new rules for large digital companies (Section 19a GWB)*, 18 May 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html (accessed 22 July 2021).

[942] Bundeskartellamt, *Proceeding against Google based on new rules for large digital players (Section 19a GWB) – Bundeskartellamt examines Google's significance for competition across markets and its data processing terms*, 25 May 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html (accessed 22 July 2021).

[943] Bundeskartellamt, *Proceeding against Apple based on new rules for large digital companies (Section 19a(1) GWB) – Bundeskartellamt examines Apple's significance for competition across markets*, 21 June 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html (accessed 22 July 2021).

[944] The United States Department of Justice, *Justice Department Sues Monopolist Google For Violating Antitrust Laws. Department Files Complaint Against Google to Restore Competition in Search and Search Advertising Markets*, 20 October 2020, available at

FTC sued Facebook for illegal monopolisation, alleging unlawful conducts both in acquisitions and in the running of the social network.[945]

2. Updating the Competition Authorities' toolbox: Towards ex ante regulation

The cases analysed in Part I of the present chapter highlight that Competition Authorities have their knowledge about digital markets, and they have found innovative enforcement solutions in order to apply existing rules in this new context, as well. Anyhow, something appears to be missing and it resulted particularly evident from the ineffectiveness of pecuniary fines to large digital firms, which can reinforce their market position through abusive conducts and pay sanctions as part of their costs of running business. Consequently, tools that can allow a preventive application of competition rules, that means before markets tip in favour of a firm, appear particularly needed. Moreover, most effective sanctions, such as structural ones, and also, in extreme situations, breakups, shall be envisaged and added to the Competition Authorities' toolbox. With regard to breakups, we could say that they effectively consist in a very heavy sanction, and, therefore, they shall be applied very carefully. However, it is worth not forgetting the discourse made about the opening of innovation portals after big breakups and the practical examples of AT&T and IBM. Also eminent scholars like Tommaso Valletti, former Chief Economist of the European Commission's DG Comp, and John Kwoka, warned about the necessary role of breakups in tipped markets, when other remedies prove to be ineffective.[946] In their words, *structural separation is likely the only*

https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws (accessed 22 July 2021).

[945] Federal Trade Commission, *FTC Sues Facebook for Illegal Monopolization. Agency challenges Facebook's multi-year course of unlawful conduct*, 9 December 2020, available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization (accessed 22 July 2021).

[946] J. Kwoka and T. Valletti, *Competition - And Competition Policy – In Digital Markets: The House Report*, CPI Antitrust Chronicle Special Edition January 2021, 2021, available at https://www.competitionpolicyinternational.com/competition-and-competition-policy-in-digital-markets-the-house-report/ (accessed 23 July 2021).

way to truly re-orient these companies' incentives toward customers, rivals, and competition.[947]

Considering the above, legislators, both in Europe and in the U.S., have enacted specific bills with the aim of addressing antitrust issues in digital markets. In particular, as we have already anticipated, in January 2021 Germany has adopted an organic reform in this field by means of the 10th Amendment to the GWB, which added its Section 19a.[948] Anyhow, legislative initiatives recently came to the enactment of new provisions in Italy and at the EU level and they are ongoing in the U.S., whilst France may already have an interesting instrument in its *Code de Commerce*. Finally, a slightly different approach, with a sort of intermediate step, has been followed by the UK. Here the CMA's Digital Markets Unit was established in April 2021.[949] The Unit's task is to introduce and enforce new rules aimed at rendering digital markets more competitive. At this aim, the Unit will collaborate with the Information Commissioner's Office and with Ofcom, the communication regulator. In particular, the code that will be introduced will define the acceptable behaviour hat platforms having a strategic market status may perform in order to comply with competition rules.[950] Moreover, the Unit will focus on the use platforms make of consumers' data and it will oversee big digital firm's behaviours towards clients and competitors. The Unit has the power to suspend, block and reverse tech giants' decisions, order them specific actions and impose monetary fines.[951] Moreover, as the CMA recommended in its own report *Online platforms and digital advertising*, also divestiture may be part of the Digital Market Unit's toolbox.[952]

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[947] *Ibidem*.
[948] The official English translation of the GWB's amended version is available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0069 (accessed 23 July 2021).
[949] UK Government, *New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated*, 27 November 2020, available at https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated (accessed 23 July 2021).
[950] *Ibidem*.
[951] *Ibidem*.
[952] Competition and Markets Authority, *Online platforms and digital advertising. Market study final report*, 1 July 2020, point 8.203, available at

2.1. The addition of Section 19a to the German GWB: A specific tool addressed at tech giants

After the decision issued against Facebook by the Bundeskartellamt and also after the 2017 amendment to the GWB – that, as we have seen, added specific provisions regarding multi-sided platforms and transactions occurring without a monetary consideration – the debate about competition in digital markets was particularly felt in Germany. As a result, on 18 January 2021 the 10th amendment to the GWB, adding Section 19a, was passed, and it entered into force on the following day.[953]

The proceeding delineated in Section 19a GWB can be described as a two-tier process. As a starting point, according to the new reform, the Bundeskartellamt may declare, by means of a decision, that a certain firm is of paramount importance for competition across markets. Pursuant to Section 19a (1) GWB, such a decision shall be based upon this undertaking's 1. dominant position on one or more markets; 2.

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https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf (accessed 25 July 2021).

[953] The relevant Bundeskartellamt press release, *Amendment of the German Act against Restraints of Competition*, 19 January 2021, is available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html (accessed 24 July 2021). See also OECD, *Annual Report on Competition Policy Developments in Germany*, 10 June 2021, 5, available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2021)11&docLanguage=En (accessed 24 July 2021); J.-U. Franck and M. Peitz, *Digital Platforms and the New 19a Tool in the German Competition Act*, Journal of European Competition Law & Practice, 2021, 12, 7, 513; Latham & Watkins, *The New German Digitalization Act: An Overview*, 20 January 2021, available at https://www.lw.com/thoughtLeadership/the-new-german-digitalization-act-an-overview (accessed 24 July 2021); Linklaters, *The revolutionary reform of German competition law – leading the pack in digital enforcement and other stories*, 20 January 2021, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/the-revolutionary-reform-of-german-competition-law (accessed 24 July 2021); Allen & Overy, *The 10th Amendment to the German Act Against Restraints of ompetition – Focus on: Digital markets and ECN+ Directive*, 20 January 2021, available at https://www.allenovery.com/en-gb/global/news-and-insights/publications/die-10-gwb-novelle (accessed 24 July 2021); DLA Piper, *Competition Law, Digitalization and the German Response – Stricter Supervision of Big Tech and Less Merger Review*, 19 January 2021, available at https://www.dlapiper.com/en/germany/insights/publications/2021/01/the-amendment-of-the-arc-is-coming/ (accessed 24 July 2021); P. Grüll, *German law aims to tackle the market power of digital markets*, Euractiv, 14 January 2021, available at https://www.euractiv.com/section/digital/news/new-german-amendment-aims-to-tackle-the-market-power-of-digital-giants/ (accessed 24 July 2021); S. van Dorpe, *Germany shows EU the way in curbing Big Tech*, Politico, 13 January 2021, available at https://www.politico.eu/article/germany-shows-eu-the-way-in-curbing-big-tech/ (accessed 24 July 2021).

financial strength or access to other resources; 3. vertical integration and activities in related markets; 4. access to data which are relevant from a competition standpoint; and 5. possibility to foreclose other parties' activities with its own business and the influence that this undertaking may exercise vis-à-vis third parties' activities. Such a decision shall last for five years.

The second phase – after having established that an undertaking has a paramount importance across markets – consists in the possibility for the Bundeskartellamt to prohibit these undertakings from carrying out some specific conducts enlisted in Section 19a (2) GWB. However, the undertaking concerned may demonstrate – according to a sort of rule of reason – that a specific conduct forbidden according to the reformed act has some objective justifications. Anyhow, the burden of proving this circumstance relies on the concerned firm.

According to the German reform, prohibited practices for these undertakings are:[954]
1. favouring its own offers over the offers of its competitors when mediating access to supply and sales markets, in particular
a) presenting its own offers in a more favourable manner;
b) exclusively pre-installing its own offers on devices or integrating them in any other way in offers provided by the undertaking;

2. taking measures that impede other undertakings in carrying out their business activities on supply or sales markets where the undertaking's activities are of relevance for accessing such markets, in particular
a) taking measures that result in the exclusive pre-installation or integration of offers provided by the undertaking;
b) preventing other undertakings from advertising their own offers or reaching their purchasers through other channels in addition to those provided or mediated by the undertaking, or making it more difficult for other undertakings to do so;

3. directly or indirectly impeding competitors on a market on which the undertaking can rapidly expand its position even without being dominant, in particular

[954] For the sake of completeness and precision, we deemed more appropriate reporting the whole provision's text.

a) linking the use of an offer provided by the undertaking to the automatic use of another offer provided by the undertaking which is not necessary for the use of the former offer, without giving the users of the offer sufficient choice as to whether and how the other offer is to be used;
b) making the use of an offer provided by the undertaking conditional on the use of another offer provided by the undertaking;

4. creating or appreciably raising barriers to market entry or otherwise impeding other undertakings by processing data relevant for competition that have been collected by the undertaking, or demanding terms and conditions that permit such processing, in particular
a) making the use of services conditional on the user agreeing to the processing of data from other services of the undertaking or a third party provider without giving the user sufficient choice as to whether, how and for what purpose such data are processed;
b) processing data relevant for competition received from other undertakings for purposes other than those necessary for the provision of its own services to these undertakings without giving these undertakings sufficient choice as to whether, how and for what purpose such data are processed;

5. refusing the interoperability of products or services or data portability, or making it more difficult, and in this way impeding competition;

6. providing other undertakings with insufficient information about the scope, quality or success of the service rendered or commissioned, or otherwise making it more difficult for such undertakings to assess the value of this services;

7. demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand, in particular
a) demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting these offers,
b) making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose.

This list encompasses almost all the conducts typical of digital gatekeepers.[955] The approach followed by the German legislator has the merit of having merged legal certainty with the flexibility needed when rules shall be applied to concrete cases by enforcement agencies. Indeed, the list of anticompetitive conduct is exhaustive and rigid, but not at the point of not being capable of adaptation to each concrete case. Moreover, the analysis which can bring to the declaration of a firm's strategic market relevance is based on precise requirements, which can however be put relation to the concrete case at stake (*i.e.*, the existence of a dominant position, access to competition-sensitive data or an intermediary position allowing the relevant firm to behave as a gatekeeper).

From a procedural standpoint, in order to speed up proceedings and trying not to intervene when the situation in the market has suffered an irremediably negative impact, a 'fast-track' proceeding for the appeal of Bundeskartellamt's decisions has been introduced. In fact, according to Section 73 of the GWB, the Bundesgerichtshof hears as first and last instance court the appeals to Bundeskartellamt's decisions adopted pursuant to the new Section 19a GWB, thus avoiding the first instance judgement by the Landsgerich Düsseldorf, which, normally, like in the analysed *Facebook* case, was in charge of this role.[956]

For the sake of concluding, the newly enacted Section 19a of the German GWB, as stated by Hansjörg Durz, a CDU member and vice-chair of the abovementioned Bundestag's Digital Agenda Committee, represents the *world's first competition law that provides answers to the challenges of digital markets*.[957] In particular, the German legislator has tried to provide a solution to two of the main issues arising when competition law is applied to digital gatekeepers: Effectiveness and

[955] Anyhow, it is worth recognising that this new reform does not require the Bundeskartellamt to prove an anticompetitive effect, as pointed out by O. Brook and M. Eben, *Abuse without dominance and monopolisation without monopoly*, in P. Akman, O. Brook, K. Stylianou (Eds.) *Research Handbook on Abuse of Dominance and Monopolization*, Edward Elgar, forthcoming, 18, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3859916_code2794100.pdf?abstractid=3859916&mirid=1 (accessed 1 November 2021). Thus, it appears to be designed more along structural lines.

[956] See also OECD, *Annual Report on Competition Policy Developments in Germany*, cit., 5.

[957] O. Noyan, *Germany fears EU digital law might loosen its antitrust grip on tech giants*, Euractiv, 24 June 2021, available at https://www.euractiv.com/section/digital/news/germany-fears-eu-digital-law-might-loosen-its-antitrust-grip-on-tech-giants/ (accessed 24 July 2021).

timeliness. With regard to the former, competition law has always appeared to be 'one step behind' tech giants in understanding, defining and sanctioning their behaviours. As we have reported, few important decisions have been by issued by Authorities, but full effectiveness was probably impossible to reach without reforms such as the new GWB's Section 19a. Effectiveness has also close ties with timeliness. Indeed, a competition law sanction cannot be effective if imposed after years of lengthy judicial proceedings. Of course, the right of defence and legal certainty must always be at the forefront when competition rules are applied, but it is evident that sanctions cannot be effective if they arrive when a market has already tipped, and competitors have left the market – with all the related social and economic implications – because of a gatekeeper's anticompetitive behaviour. This is valid also in case a foreclosed competitor has not quitted the market, as it cannot return to the market position it had when its competitive momentum was foreclosed. For the sake of exemplifying, we can make reference to the AGCM's Enel X decision analysed above: As pointed out by the Italian Authority itself, Enel X can gain market shares in this moment, when the electric cars market is expanding, and it is in this moment that it can benefit from its possible first-mover advantage. If it is foreclosed, it will not attract users in this moment, but these users will choose another service (maybe Google's one) and Enel X will be very unlikely to 'recover' these users in the future. If competition law intervenes when portals are open and when firms can take advantage of their innovative products, both innovative firms and consumers will benefit, together with competition as such. However, in order to obtain such a result, a sort of preventive, *ex ante*, intervention is needed, and this is the true innovation brought by the 2021 GWB's reform. Moreover, timeliness is also concerned by the provision of a single degree of appeal against decisions issued by the Bundeskartellamt upon Section 19a. At a first sight, this might represent a weakening of the parties' right of fair trial, but this assumption is erroneous. Contrarywise, the GWB's approach found the perfect *metriotes* between fair trial (granted by an appeal before the Bundesgerichtshof) and effectiveness of competition law, as explained right above. Furthermore, at this purpose, it is worth reminding that the European Court of Human Rights' Guide to Article 6 of the European Convention on Human Rights (having regard to the criminal limb, which

can be deemed much more applicable to competition law's sanctions, as confirmed also by the same Court's *Menarini* judgement[958]) *does not compel the Contracting States to set up courts of appeal or of cassation*.[959] Moreover, this conclusion may be reached also by means of a comparative analysis: If we consider that Countries such as England and the United States does not provide for a full right to appeal, as it is possible only if a *certiorari* is obtained, we can understand that the new German regime is not in conflict with the right to a fair trial, but instead it pursues the whole society's right to a fair competition on the market.

2.2. The French abuse of economic dependence and the Italian AGCM's proposal

Although any reform has been adopted or is likely to be approved soon in France, this does not mean that the debate over competition law and digitalisation is not flourishing. Interestingly, the French Autorité de la Concurrence published a sort of position paper on 21 February 2020, aimed at outlining what are its the priorities in this field.[960] The paper highlights that specific measures shall be adopted with regard to firms enjoying of a sort of structural position of dominance in the market. This derives from the assumption – as we have noted – that certain platforms, due to the examined digital market's specific characteristics, may naturally reach the position of monopolies in their relevant market.[961] The French Authority appears to recognise the limits of pecuniary fines in this specific field, and it sustains the need for implementing remedies focused on commitments agreed between the firms and the Authority and that the latter may enforced by means of the effective and typically French tool of *astreinte*.[962] In particular, the Autorité de la Concurrence affirmed the necessity of these remedies with reference to interoperability and data

[958] European Court of Human Rights, decision 27 September 2011, application no. 43509/08, *A. Menarini Diagnostics S.r.l. v. Italy*, paras 42-44.
[959] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights*, 30 April 2021 update, 18, available at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf (accessed 24 July 2021).
[960] Autorité de la Concurrence, *The Autorité de la Concurrence's contribution to the debate on competition policy and digital challenges*, cit.
[961] *Ibidem*, 4.
[962] *Ibidem*, 8.

access obligations to be imposed on structurally dominant or quasi-dominant tech firms.[963]

The French legal system, however, is already equipped with a provision that may result particularly helpful in the digital context. We are referring to Article L 420-2 of the French *Code de Commerce* (coming after article L 420-1, about abuse of dominant position), which states that *inasmuch as it is liable to affect competitive functioning or structure, the wrongful exploitation by an undertaking or a group of undertakings of the state of economic dependence in which a client or supplier undertaking finds itself with regard to them is moreover prohibited. These abuses may, in particular, involve a refusal to supply, tying practices or the discriminatory practices referred to in section I of Article L. 442-6 or agreements that oblige distributors to stock entire product ranges*.[964] As explained by the French Authorities themselves, in order to breach this rule, three conditions must be met. First, a situation of economic dependency must exist. Then, a contractual counterparty shall exploit this situation and, finally, this behaviour must have an impact on the competitive structure.[965] Furthermore, it is clear that this provision does not forbid economic dependency as such, but its exploitation, as it happens with regard to the abuse of dominant position.[966] Moreover, dependency is a situation that occurs when a firm is unable to find different business opportunities at the same conditions if compared to the contractual relationship intercurrent with the party which is exploiting its power over the dependant one.[967]

Article L 420-2 of the French *Code de Commerce*, which did not seek too much attention until now (especially if compared to Article L 420-1), may play a very important role in the context of digitalisation. Indeed, as we have analysed, some of the main practices put in place by large digital firms are directed at imposing heavy conditions on dependant firms (almost all, given the role of gatekeepers that

[963] *Ibidem*, 7-8.
[964] Official French translation provided by the French Ministère de l'Économie, des Finances et de l'Industrie, *Guide for the quality of client-supplier contractual relations*, 9, available at https://www.economie.gouv.fr/files/files/directions_services/mediateur-des-entreprises/PDF/english-guide.pdf (accessed 23 July 2021).
[965] *Ibidem*.
[966] *Ibidem*.
[967] *Ibidem*.

big tech play). For the sake of exemplifying, we have described the business relationships occurring among Amazon and sellers present on its marketplace, where firms which are compliant with Amazon's conditions, for instance with regard to logistics, are favoured. The same might be applied to app developers. Therefore, this provision may prove effective in sanctioning these behaviours in a more flexible and faster manner, given that market dominance (which requires, as observed, lengthy econometric processes) shall not be demonstrated here, but only economic dependency, which appears to be much more straightforward to prove.

It is worth to note that such a tool is not available in France only. The German GWB's Section 20 provides for specific provisions directed at conduct of undertakings with relative or superior market power. With particular focus to our discourse, paragraph 1 of this Section provides that the rules about abuse of dominant position *shall also apply to undertakings acting as intermediaries in multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist*. Moreover, paragraph (1a) of the same Section 20 states that dependence exists also when a firm *is dependent on accessing data controlled by another undertaking in order to carry out its own activities. Refusing to grant access to such data in return for adequate compensation may constitute an unfair impediment*. This applies also if these data are not traded. Finally, paragraph (3a) provides that an abuse of economic dependency occurs when a powerful firm *impedes the independent attainment of network effects by competitors*, creating a risk of restricting competition on the merits. Also in this case, the potential of these rules is evident, because they can address conducts which are specific of the digital market environment, thus without having to strictly define markets in order to demonstrate a firm's dominant position.

The opportunities hidden in this kind of provision have been discovered also by the Italian AGCM, which, in 2021, suggested the Italian Government to integrate the current Italian provision on abuse of economic dependency (Article 9, law 18 June 1998, no. 192,[968] law on subcontracting in productive activities) with some

[968] Law 18 June 1998, no. 192, published in OJ 22 June 1998, no. 143.

amendments deemed useful to adapt it to the digital context.[969] In detail, the AGCM proposed the introduction of a rebuttable presumption of economic dependency with regard to contractual relationships with a platform acting as an intermediary and benefitting of a fundamental tool for reaching a firms' users or suppliers. Moreover, the Italian Authority also encouraged the introduction of a list of prohibited practices for undertakings enjoying a superior market position. Such prohibitions should include, *inter alia*, the direct imposition of sale or buying conditions, applying different conditions for equivalent performances and being unilaterally advantaged with unnecessary performances, especially when the quality of a service is decreased due to an unnecessary or unproportioned flow of data.[970]

Furthermore, the AGCM envisaged the opportunity to introduce in Italy provisions on abuse of dominant position designed according to the GWB's new Section 19a.[971] In particular, the Italian watchdog suggested to draft a provision allowing the Authority to classify some firms as having a very high degree of market power (qualification that should last for five years), based upon some specific indexes (such as having a dominant position in one or more markets, having access to data which are relevant for competition, *etc*.).[972] Once a firm is added to this 'list', the AGCM may prohibit the performance of some behaviours deemed particularly harmful for the competitive process. Anyhow, the firm has the opportunity to show that these behaviours would not distort competition.[973] The AGCM also suggested introducing, in what it designated as Article 3-*bis* of the Italian Competition Act, Law 10 October 1990 no. 287, a catalogue of conduct that are likely to be prohibited

[969] Autorità Garante della Concorrenza e del Mercato, *AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021*, 22 March 2021, 56, available (in Italian only) at https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf (accessed 23 July 2021). See also Freshfields Bruckhaus Deringer LLP, *Italian Antitrust Authority's proposed reform of the national antitrust rulebook: what's in it for digital players?*, 29 March 2021, available at https://riskandcompliance.freshfields.com/post/102guad/italian-antitrust-authoritys-proposed-reform-of-the-national-antitrust-rulebook (accessed 23 July 2021).
[970] Autorità Garante della Concorrenza e del Mercato, *AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021*, cit., 56.
[971] *Ibidem*, 56-57.
[972] *Ibidem*.
[973] *Ibidem*.

for firms having such a powerful market position. Among others, the Authority's proposal contemplates self-preferencing, obstacles to interoperability or data portability, using processing of personal information in order to create or strengthen barriers to entry, asking for conditions which are not proportional to the service offered, in particular when data not necessary for the performance are required or in case the quality of such performance is conditioned to the transfer of data and it is not proportioned with the service required.[974]

The AGCM's proposals were in part implemented by the Italian legislator by means of Law 5 August 2022 no. 118, the so-called 'law for the market and competition for the year 2021'.[975] In particular, this reform, at its Article 33, amends the abovementioned Article 9 of Law 192/1998 by adding the rebuttable presumption mechanism proposed by the AGCM. In particular, the newly added lines provide that economic dependence is presumed in case an undertaking uses intermediation services provided by a digital platform having a fundamental role in reaching suppliers or end users. For this purpose, network effects or the availability of data shall be taken into consideration. Article 33 of the reform tries also to provide a list of the abusive practices that platforms may perform. In particular, the law envisages: Providing insufficient information or data with regard to the scope or the quality of the service provided, requiring undue unilateral performances which are not justified by the nature of the activity concerned, creating obstacles for an undertaking in case it is willing to use another supplier for the same service.

Although this reform introduced the just analysed innovations, proposed by the Italian competition Authority in 2021, it avoid introducing a proper *ex ante* structural mechanism, as done by Section 19a GWB or by the DMA Regulation. It is worth reminding that this set of rules was proposed by the same AGCM as well. The fact that the Italian legislator did not introduce such a mechanism might rely on policy choices, probably due by the imminent approval of the DMA Regulation.

Anyway, another interesting innovation can be found, although with reference to concentration, at article 32 of Law 118/2022. This provision establishes that in

[974] *Ibidem*.
[975] Law 5 August 2022, no. 118, published in OJ 12 August 2022, no. 188.

evaluating concentrations that must be notified according to Article 16 of Law 287/1990, the Authority values if they are directed to obstacle effective competition in the market concerned or in a significant part therein, in particular if they create or reinforce a dominant position. The provision envisages a sort of structural analysis of the market concerned to be carried out by the AGCM, which shall also consider the interests of intermediate and final consumers, as well as technical and economic progress, at the condition that it is not detrimental to competition and it is in the interest of consumers. What is particularly interesting is that the reform states that the AGCM can evaluate the anticompetitive effects on acquisitions of small enterprises characterised by innovative strategies, also in the field of new technologies. Moreover, the reform provides that the Authority can require the undertakings concerned to notify a concentration operation also in case only one of the two thresholds provided for by Article 16 of Law 287/1990 are met,[976] or in case the total worldwide turnover realised by all the concerned undertakings is above 5 billion euros, taking also into account the negative impact that such a concentration can have on the diffusion of small enterprises characterised by innovative strategies.

In the end of this analysis, the new Italian reform can be praised as it strengthens the abuse of economic dependence mechanism, providing the AGCM with a more powerful tool against digital platforms, together with what appears to be a well-tailored provision on concentrations, with a particular focus on contrasting the so-called killer acquisitions. However, the Italian legislator did not transpose into law the proposal for an *ex ante* mechanism, as suggested by the AGCM. Probably, this could be viewed as a wise choice, as the DMA Regulation was soon to be published and therefore it was not advisable to enact provisions that could have clashed with it.

2.3. The new EU tool: The EU Digital Markets Act

[976] These thresholds are provided for by Article 16, paragraph 1, of Law 287/1990, and they require the prior notification to the AGCM in case: 1. The total turnover realised in Italy by the concerned undertakings is above 492 million euros; 2. The total turnover individually realised in Italy by at least two of the undertakings concerned is above 30 million euros.

The European Union, as we have already pointed out, pursued what it called the European digital strategy, which is based upon two pillars: The Digital Services Act (DSA) and the already mentioned Digital Markets Act (DMA). According to the Commission, this package pursues two goals: *To create a safer digital space in which the fundamental rights of all users of digital services are protected* and *to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally*.[977] This strategy is of course based upon policy considerations and, in our view, this shall be welcomed, as competition policy shall not act in a vacuum, but as a legislation aimed at achieving overarching policy (for the sake of clarity, not politics) objectives, such as, in this case, the establishment of open, competitive and fair markets.

With specific reference to the DMA, on 3 June 2020 the Commission launched a consultation aimed at receiving proposals about what was called as a 'new competition tool',[978] which appeared to be inspired by the UK's market investigation reference,[979] but no further details were available. Consequently, in autumn 2020, the Commission clarified that it would have proposed soon what on

[977] European Commission, *The Digital Services Act package*, 26 April 2021, available at https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (accessed 25 July 2021).

[978] European Commission, Public consultation, *Single Market – new complementary tool to strengthen competition enforcement*, 3 June 2020 – 8 September 2020, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation_en (accessed 25 July 2021). See also Freshfields Bruckhaus Deringer LLP, *The EU's (proposed) new competition tool – a paradigm shift towards more intervention in digital markets and possibly beyond*, 5 June 2020, available at https://technologyquotient.freshfields.com/post/102g8y2/the-eus-proposed-new-competition-tool-a-paradigm-shift-towards-more-interven (accessed 25 July 2021).

[979] Professor Richard Whish's speech at the Trento Summer School on Advanced Competition Law & Economics, 2020 virtual edition. See also B. Vesterdorf and K. Fountoukakos, *A New Competition Tool into Old Bottles? Considerations on the Legal Design of the European Commission's Proposed NCT*, Journal of European Competition Law & Practice, 2020, 8. The CMA market investigation reference is a proceeding governed by Part 4 of the Enterprise Act 2002, as amended by the Regulatory Reform Act 2013. This tool is aimed at investigating if a market is characterised by features leading to adverse effects on competition. in case the investigation finds these adverse effects, the CMA can impose remedies (including structural ones), but also make recommendation to other Authorities or to the Government (in case, for instance, legislation is required). About CMA market investigation references see Competition and Markets Authority, CMA market investigations, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336077/Energy_market_investigation_note.pdf (accessed 25 July 2021); R. Whish and D. Bailey, *Competition Law*, cit., 469-481.

15 December 2020 has been presented as the Digital Markets Act.[980] After all, the final text of Regulation (EU) 2022/1925 was enacted on 14 September 2022 and published on the Official Journal of the EU on 12 October 2022.[981]

The DMA consists in a Regulation regarding specifically the so-called 'gatekeepers' active in digital markets. The limitation of the DMA's scope to the digital sector shall only be regarded as a policy choice operated by the European Legislator, which decided not to introduce a general-scope tool.[982] The Regulation, in its first Recitals, recognises the benefits brought by digitalisation to both users and businesses.[983] However, it is also argued that platforms are endowed with inner characteristics that might be exploited by their owners. In this context reference is made to large economies of scale, close-to-zero marginal costs for providers, network effects, lock-in effects and advantages resulting from the processing of large amounts of data.[984] According to Recital 2 of the DMA, these features, if combined with abusive conducts by these services' providers *can have the effect of substantially undermining the contestability of the core platforms services, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their business users and end users. In practice, this leads to rapid and potentially far-reaching decreases in business users' and end users' choice, and therefore can confer on the provider of those services the position of a so-called gatekeeper*. The Regulation also recognises that *a small number of large undertakings providing core platform services have emerged with*

[980] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM(2020) 842 Final, 2020/0374 (COD), 15 December 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en (accessed 25 July 2021). See also European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (accessed 25 July 2021); DLA Piper, *New competition tool and ex ante regulation of gatekeeping platforms*, 17 December 2020, available at https://www.dlapiper.com/it/italy/insights/publications/2020/12/antitrust-matters---special-edition/new-competition-tool-and-ex-ante-regulation/ (accessed 25 July 2021).
[981] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), published on the OJ of the EU 12 October 2022, L 265/1.
[982] B. Vesterdorf and K. Fountoukakos, *A New Competition Tool into Old Bottles? Considerations on the Legal Design of the European Commission's Proposed NCT*, cit., 6.
[983] DMA, Recital 1; Commission's Explanatory Memorandum, para 1.
[984] DMA, Recital 2; Commission's Explanatory Memorandum, para 1.

considerable economic power and that *some of those undertakings exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may be*.[985] Furthermore, the DMA tellingly stresses that *the combination of those features of gatekeeper is likely to lead, in many cases, to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector*.[986]

In light of the above, it has been deemed necessary to adopt specific measures aimed at curbing these gatekeepers' excessive power. Such rules are regarded as a complement to existing competition rules, and, in detail, they are necessary to cover practices which fall outside the action of current competition rules or that the latter, in their current shape, cannot effectively address.[987] In particular, this Regulation is directed at addressing abusive practices *ex-ante,* in respect of the *ex-post* approach characteristic of 'default' competition provisions.[988] In particular, as stated by Recital 11, the newly enacted rules are directed at ensuring that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper on competition in a given market.

The new Regulation also aims at complementing data protection rules.[989] Moreover, the DMA is also directed at maintaining coherence in the application of rules to digital gatekeepers, by preventing Member States to apply national rules specifically addressed to these gatekeepers and their services.[990] This, may constitute an obstacle for important reforms at the national level, such as the

[985] DMA, Recital 3.
[986] DMA, Recital 4.
[987] Commission's Explanatory Memorandum, para 1.
[988] *Ibidem*.
[989] DMA, Recital 12; Commission's Explanatory Memorandum, para 1.
[990] DMA, Recitals 9 and Article 1, paragraph 5.

German one.[991] For the purpose of finding a solution to this issue, a European Parliament's amendment to the DMA proposal suggested the introduction of a European High-Level Group of Digital Regulators, composed by the head of the Member States' Authorities and by members of the Commission.[992] This group has been established by Article 40 DMA for broader purposes. The final text of the Regulation, at Article 1, paragraph 5, states that *to avoid the fragmentation of the internal market, Member States shall not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets*. Member States can instead impose obligations on gatekeepers for matters falling outside the DMA's scope. The subsequent paragraph of the same Article 1 DMA further specifies that the Regulation is without prejudice to the application of (point (b)) *national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers* (as defined by the DMA). For this purpose, according to Article 38 DMA, in case a national competition Authority intends to apply the provisions referred to in article 1, paragraph 6, point (b), DMA, it shall inform the Commission.[993]

Article 1 of the DMA defines the scope of the bill, which is limited at gatekeepers active in the digital sector. The structural functioning of the Regulation reminds that of the German reform and of the Italian AGCM's original proposal. In particular, a twofold procedure is envisaged: In what we can call the 'ascendant' phase, a gatekeeper is identified as having a structural importance on the market,[994] and in the second 'descendant' phase, this firm has to comply with specific obligations,

[991] On this point see, inter alia, M. Botta, *Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila*, Journal of European Competition Law & Practice, 2021, 12, 7, 500.
[992] European Parliament, *Draft Report on the proposal for a regulation of the European Parliament and of the Council, Contestable and fair markets in the digital sector (Digital Markets Act)*, COM(2020)0842 – C9-0419/2020 – 2020/0374(COD), 1 June 2021, Amendment 98, available at https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf (accessed 24 July 2021).
[993] And this information must be made available to other Member State's competition Authorities applying the same rules referred to in Article 1, paragraph 6, DMA.
[994] On the designation of gatekeepers see also European Commission, *The EU Digital Markets Act. A Report from a Panel of Economic Experts*, 2021, 9-10, available at https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf (accessed 25 July 2021).

and it can also result the addressee of fines imposed by the Commission in case of non-compliance with these obligations.[995]

For the applicative scope of the Regulation at stake, a gatekeeper shall be active in what is called as a 'core platform service'. This definition encompasses online intermediation services, search engines, social networks, video-sharing platforms, internet-based communication services, operating systems, cloud computing services and advertising services.[996] If a firm provides one or more of the above-listed services, it can be designated as a gatekeeper if match some precise requirements, which are provided for in Article 3. In particular, if:[997]

(a) it has a significant impact on the internal market;
(b) it provides a core platform service which is an important gateway for business users to reach end users; and
(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

These requirements, which appears quite generic at a first sight, are better specified in the following Article 3's paragraph, where it is stated that point (a) above is satisfied if an undertaking reaches an annual turnover in the European Union equal or above 7.5 billion euros in each of the last three financial years or if it holds an average market capitalisation or fair market value of at least 75 billion euros in the last financial year, and if it exercises a core platforms service at least in three EU Member States.[998] The requirement under paragraph 1's letter (b) is satisfied whether, during the last financial year, the core platform at stake has an user base of more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU.[999] Finally, the requirement provided for by letter (c) of paragraph 1 is fulfilled if the thresholds

[995] On the gatekeepers' obligations see also European Commission, *The EU Digital Markets Act. A Report from a Panel of Economic Experts*, cit., 10-11.
[996] DMA, Article 2, point (2).
[997] DMA, Article 3, paragraph 1. For the sake of completeness and precision, we deemed more appropriate reporting the whole provision's text.
[998] DMA, Article 3, paragraph 2, point (a).
[999] DMA, Article 3, paragraph 2, point (b).

contained in point (b) of paragraph 2 were met during each of the last three financial years.[1000]

As already observed whilst analysing the new GWB's reform, the EU's approach appears to be highly compliant with legal certainty requirements, but at some extent it may be deemed too rigid and consequently it is lacking the necessary flexibility that shall characterise enforcement of rules in a fast-changing environment such as the digital one. In light of this, the German approach appears more apt for the challenges it is called to face. Anyhow, Article 19 DMA envisages a tool in the Commission's availability directed at 'updating' the Regulation, so as to allow the Commission of making use of the DMA in a fast-changing context. According to this provision, the Commission is entitled to perform a market investigation aimed at examining if new digital services and practices need to be added to the list of core platform devices. After having opened such a market investigation, a report shall be issued within eighteen months.

Returning to the designation of a gatekeeper, in case all the requirements listed in Article 3 are met, the relevant firm shall notify the Commission, which shall issue a decision identifying such service provider as a gatekeeper. Anyhow, the Commission is empowered – based on the information it holds – to adopt such a definition also in case the firm fails to perform such a notification.[1001] For the sake of adopting such a decision, the Commission may open a market investigation directed at examining if a particular service provider shall be designated as a gatekeeper.[1002]

Anyhow, in case the abovementioned requirements are met, the concerned firm shall present motivated observations in order not to be qualified as a gatekeeper.[1003] Moreover, the Commission can designate as gatekeepers also firms which does not completely meet all the threshold enlisted in Article 3, paragraph 2. At this purpose, it can consider factors such as the firm's size, the number of business users depending on the platforms in order to reach end users, lock-in effects and

[1000] DMA, Article 3, paragraph 2, point (c).
[1001] DMA, Article 3, paragraphs 3 and 4.
[1002] DMA, Article 17.
[1003] DMA, Article 3, paragraph 5.

advantages deriving from data gathering and processing.[1004] In addition, according to Article 4, paragraph 2, almost every three years the commission shall verify if providers qualified as gatekeepers are still maintaining the requirements set forth by Article 3, paragraph 1.

Once discussed the 'ascending' phase, the 'descending one' is characterised by the behaviours required to gatekeepers. These obligations are enlisted in Article 5, 6 and 7 and they have some features in common with the German GWB's Section 19a ones. In particular, gatekeepers should refrain from combining data obtained through the main service with data gathered from other services offered by the gatekeeper or from third-party services (the conduct condemned by the Bundeskartellamt in its *Facebook* case). Other conducts comprehend discrimination regarding the conditions at which the same product is provided with respect to third-party channels and the gatekeeper's ones; self-preferencing; preventing interoperability or the user's right to data portability, just to enlist some of the conducts deemed abusive by the European legislator (although, having regard to those provided by Article 6 and 7, the measures that the undertaking concerned must implement needs to be specified through an implementing act issued by the Commission).[1005] Moreover, it is also interesting that the DMA requires that actions aimed at complying with Articles 5, 6 and 7 shall be implemented in compliance with the GDPR.[1006]

Having regard to the enforcement profile of the Regulation, the Commission holds very penetrating investigative powers,[1007] and it can also take interim measures.[1008] In the end of these procedures, it can both express its agreement to commitments offered by the gatekeeper[1009] or adopt a non-compliance decision imposing pecuniary fines.[1010] In case the gatekeeper did not comply with requirements set

[1004] DMA, Article 3, paragraph 8.
[1005] DMA, Article 8, paragraph 2.
[1006] DMA, Article 8, paragraph 1.
[1007] DMA, Chapter V.
[1008] DMA, Article 24.
[1009] DMA, Article 25.
[1010] DMA, Articles 29 and 30.

forth in Articles 5, 6 and 7, such a fine may not exceed 10% of the gatekeeper's total worldwide turnover in the preceding financial year.

However, from an enforcement perspective, the most interesting innovations have regard to behavioural or structural remedies. This option, introduced also by Recital 75, which makes specific reference to divestiture, can be applied in case of systematic non-compliance of an undertaking to the obligations provided by the Regulation. In detail, According to Article 18, the Commission can perform a market investigation in order to establish if a gatekeeper has systematically violated the obligations prescribed by Articles 5, 6 and 7 and it has strengthened its gatekeeping position. As a result of such investigation, the Commission shall impose behavioural or structural remedies. Anyhow, these remedies must be proportionate and necessary to ensure the effective compliance with the new Regulation.[1011] In addition, the systematic non-compliance with Articles 5, 6 and 7 that triggers the possibility of imposing these remedies occurs only when the Commission has issued at least three non-compliance or fining decisions in respect of the gatekeeper concerned within eight years prior to the adoption of the decision to open a market investigation pursuant to Article 18.[1012]

Having regard to the right to a fair trial, several guarantees for the gatekeepers concerned are provided,[1013] and the Commission's decisions imposing fines or periodical payments are subject to the Court of Justice's unlimited jurisdiction according to Article 261 TFEU.[1014]

For the sake of concluding our analysis of the DMA, it is first necessary to underline that this Regulation is of paramount importance in order to render EU competition law capable of better regulating digital markets. It is a significant step that may allow the Commission to govern the digital process instead of tailing its development. Anyhow, the mentioned possible overlap between national rules, such as Section 19a of the German GWB, shall be addressed in a way that do not deprive National Competition Authorities of effective tools and that, at the same

[1011] DMA, Article 18, paragraph 1.
[1012] DMA, Article 18, paragraph 3.
[1013] DMA, Article 34.
[1014] DMA, Article 45.

time, does not undermine the coherence of the whole European competition regulatory framework aimed at governing digitalisation. In the end, this new Regulation will for sure represent a tool observed worldwide and probably transplanted – of course, with the due adjustments – by Countries aiming at – thanks to digitalisation – *providing new business opportunities in the Union and facilitating cross-border trade and […] opening entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union*.[1015]

2.4. The U.S. and the path towards the Digital Platforms Anti-Monopoly Act

The United States, as we have observed, represent antitrust law's Country of origin. However, its history, as told in this book, after having seen a very effective enforcement of these rules, reached a setback and antitrust statutes became more like a monument than an operative tool. In fact, after the Chicago revolution, and above all in the present decades, the European Commission represents the centre of antitrust enforcement, the place in which the biggest cases, especially if we consider monopolisation, are brought. We reported that in the United States no big monopolisation cases were started after the (settled) *Microsoft* one. The consequence of this 'deep freeze' is the growth of enormous concentrations of economic power rightly in the hands of U.S. corporations, like big tech firms. Therefore, antitrust, as we have seen, became more and more object of political debate, but despite the promises, nothing was concretely done. With the election of President Biden something appears to have moved with regard to the composition of administrative Authorities. In fact, President Biden appointed 'hipsters' Lina Khan as FTC's Chair,[1016] Tim Wu at the National Economic Council[1017] and Jonathan Kanter as Assistant Attorney General at the Department of Justice's

[1015] *Ibidem*, Recital 1.
[1016] C. Kang, *Lina Khan, a progressive trustbuster, displays get-tough approach to tech in confirmation hearing*, The New York Times, 21 April 2021, available at https://www.nytimes.com/2021/04/21/business/lina-khan-ftc.html (accessed 26 April 2021).
[1017] C. Kang, *A Leading Critic of Big Tech Will Join the White House*, The New York Times, 5 March 2021, available at https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html (accessed 26 April 2021).

Antitrust Division.[1018] In the meanwhile, however, an important effort was taken at the Congress level. Also academia gave an important contribution to this debate thanks, also, to the 'Neo-Brandeisian' movement. Moreover, in 2020 a very important and complete report was issued by the University of Chicago and, in the end of the same year the Congressional Report on antitrust and digitalisation was published. Whilst the former provides some important solutions, the latter constituted the basis for some legislative initiatives that have just been proposed and that may radically change the status of sleepiness that appeared to characterise U.S. antitrust. We are referring, in particular, to some bills approved in June 2021 by the House Judiciary Committee (despite growing opposition) and which can be without doubt compared to the European DMA, as they have the potential to restore the position of the U.S. at the forefront of the discourse about competition and digital markets.[1019] Among these bills, it is necessary to mention the *American Choice and Innovation Online Act*,[1020] the *Ending Platform Monopolies Act*,[1021] the *Platform Competition and Opportunity Act*,[1022] the *Augmenting Compatibility and Competition by Enabling Services Switching Act*.[1023]

In a nutshell, the *Augmenting Compatibility and Competition by Enabling Services Switching Act* is aimed at promoting competition by lowering barriers to entry and lock-ins, so as to favour interoperability and data portability; the *American Choice*

[1018] The White House, *President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust*, 20 July 2021, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/ (accessed 25 July 2021); L. Hirsch and D. McCabe, *Biden to Name a Critic of Big Tech as the Top Antitrust Cop*, The New York Times, 20 July 2021, available at https://www.nytimes.com/2021/07/20/business/kanter-doj-antitrust.html (accessed 25 July 2021).

[1019] R. Lerman, *Big Tech antitrust bills pass first major hurdle in House even as opposition grows*, The Washington Post, 24 June 2021, available at https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/ (accessed 25 July 2021).

[1020] U.S. Congress, *H.R.3816 – American Choice and Innovation Online Act*, available at https://www.congress.gov/bill/117th-congress/house-bill/3816/text (accessed 25 July 2021).

[1021] U.S. Congress, *H.R.3825 – Ending Platform Monopolies Act*, available at https://www.congress.gov/bill/117th-congress/house-bill/3825/text?r=34&s=1 (accessed 25 July 2021).

[1022] U.S. Congress, *H.R.3826 – Platform Competition and Opportunity Act of 2021*, available at https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1 (accessed 25 July 2021).

[1023] U.S. Congress, *H.R.3849 – Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021*, available at https://www.congress.gov/bill/117th-congress/house-bill/3849/text (accessed 25 July 2021).

and Innovation Online Act is directed at prohibiting discriminatory conducts by digital gatekeepers, with a specific reference to self-preferencing; the *Ending Platform Monopolies Act* has the objective of curbing the possibility of digital gatekeepers to use abusive conducts allowed by their market dominance in order to expand into adjacent markets; and the *Platform Competition and Opportunity Act* is targeted at prohibiting the so called 'killer acquisitions' of competing firms threatening the gatekeepers' dominant position in a market as well as at impeding acquisitions directed only at strengthening such a position.

Having regard to the possible remedies, breakups have been envisaged both in the proposed legislation and in the mentioned Reports. In fact, the Congressional Report includes breakup as a possible remedy in the digital context, and it observed that it has also the benefit of being more administrable than behavioural remedies, which requires a sort of 'day-by-day' monitoring.[1024] At this purpose, the Chicago University's Stigler Center Report, in order to sustain the need for a digital sector regulator, stated that *some of the problems discussed above may have only one structural solution: breakup of the platform. An enforcer might not want to choose that option because it is very disruptive. But less disruptive ex post remedies require ongoing monitoring, which antitrust enforcers are not well-positioned to do. Handing that job off to a regulator might better serve consumers*.[1025] As a consequence, the Report proposed the establishment of what has been called 'The Digital Authority'. Such solution, according to the Report, has also the benefit of not being directed at applying competition law only, as it can serve the purpose of reaching the *optimum* of the joint and synergic application – *multi-tool* – of competition law, data protection law and consumer law.[1026] Anyhow, breakup figures also as a remedy in the *American Choice and Innovation Online Act*, where it is stated that if a violation of the ACT *arises from a conflict of interest related to the covered platform's concurrent operation of multiple lines of business, the court*

[1024] U.S. House of Representative, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets*, cit., 380-381.
[1025] University of Chicago's Stigler Center, *Report on antitrust and digital platforms*, cit., 80.
[1026] *Ibidem*, 83-97.

shall consider requiring divestiture of the line or lines of business that give rise to such conflict.[1027]

2.5. The scholars' proposals: A new standard for competition law?

The scholar debate around possible reforms to be passed, especially with regard to U.S. antitrust law, raised reflections about the need of 'reviewing' the consumer welfare standard as interpreted in light of the Chicago theories. Authors like Stucke and Steinbaum and Wu have proposed their own standards, which appear, in our view, much more appropriate in addressing the current levels of market concentrations and the related challenges brought by digitalisation.

According to Stucke and Steinbaum, an *effective competition standard* shall replace the Chicago-flavoured consumer welfare standard, with the aim of restoring *the primary aim of the antitrust laws – namely, the dispersion and deconcentration of significant private power wherever in the economy it is to be found, including throughout supply chains and in the labor market*.[1028] In particular, as affirmed by the same Authors, antitrust should be directed at protecting the competitive process.[1029] Furthermore, they suggest five pillars upon which this standard shall be built, which are the preservation of competitive market structures; the protection of individuals, purchasers, consumers, and producers; the preservation of opportunities for competitors; the promotion of individual autonomy and well-being; and the dispersion of private power.[1030] On a practical side, they suggest, *inter alia*, less burdensome evidentiary requirements for plaintiffs needing to show a firms' market power, together with a revisited and reinvigorated monopolisation and merger policy, in addition to a closer attention to non-price parameters, like

[1027] *American Choice and Innovation Online Act*, cit., Section 2, (f)(2)(D)(i).
[1028] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 596. See also M.E. Stucke, *Invited Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, And Administrative Law*, cit.
[1029] M. Steinbaum and M.E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, cit., 601.
[1030] *Ibidem*, 602-603.

quality.[1031] Having regard to remedies, they sustain the need for the implementation of structural remedies, *including breaking up the monopoly and monopsony*.[1032]

In a similar vein, Professor Wu argues for a *protection of competition test*[1033] or *competitive process standard*,[1034] which, according to the same Author, *asks the state to eliminate subversions and abuses of a healthy market system*.[1035] According to him, this standard shall account for both price and quality considerations into the competition enforcement discourse.[1036] Moreover, how he plainly affirms, such a paradigm requires political considerations,[1037] which in our view sounds better as 'policy considerations', which means, also in line with the work of Stucke and Steinbaum, choosing what are the policies that competition law shall pursue and which rights it shall protect. Talking about 'rights to be protected' and 'policy' or 'political' considerations in competition law often appears strange. However, as we have already pointed out, competition law is a policy which is not independent from the whole constitutional background and, as a consequence, also from more socially oriented policies. It shall not account only for economic and econometric concepts, but it shall pursue the objective of a fair market where everyone has the possibility to succeed, according to the, although broader, 'equality of starting points' concept well expressed by former Italian Republic President and eminent scholar Luigi Einaudi.[1038] For this reason, proposals like the protection of competition standard or the effective competition standard shall be sustained, because only if competition is not impaired the market economy system can provide its best products. In this sense both Louis Brandeis' and the Ordoliberals' lessons are of paramount importance.

[1031] *Ibidem*, 605-610, 616.
[1032] *Ibidem*, 617.
[1033] T. Wu, *The Curse of Bigness*, cit., 160.
[1034] T. Wu, *Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, And Administrative Law*, 25 April 2020, 7-8, available at https://judiciary.house.gov/uploadedfiles/submission_from_timothy_wu.pdf (accessed 25 July 2021).
[1035] T. Wu, *The Curse of Bigness*, cit., 160.
[1036] T. Wu, *Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, And Administrative Law*, cit., 7.
[1037] T. Wu, *The Curse of Bigness*, cit., 160.
[1038] L. Einaudi, *Lezioni di politica sociale*, cit., 169-246.

PART III – THE ROLE OF PRIVATE ENFORCEMENT

The previous parts of this chapter were focused on the challenges that digitalisation brought in the competition law discourse. Anyhow, the whole analysis considered only one limb of competition law enforcement, which is public enforcement. In the discussion about the changes currently needed in competition law, private enforcement – *i.e.*, the filing of a competition case by a private party – often remains on the landscape. Anyhow, as it represents a necessary tool for a more organic application of competition law – thus increasing its deterrence – private enforcement cannot be ignored, and this part's aim is that of understanding what reforms and innovations are necessary to tailor a private enforcement regime which may play a fundamental role in addressing the issues at the centre of the present work.

1. The evolution of private antitrust enforcement: An overview

As a starting point, it is worth introducing private enforcement of competition law through a contextualisation in the most influential competition law models, *i.e.*, the U.S. and the EU. The first main difference between the two systems lies in the role played by private enforcement. Indeed, whilst in the U.S. it represents the core tool for applying competition provisions, the EU systems relies more on an administrative system, where the main actors are the EU Commission and the various Member States' competition Authorities. This is confirmed by data, which show that in the U.S. 95% of competition cases is introduced by means of private actions, and stand-alone claims (*i.e.*, those filed without a previous investigation by a competition Authority) play a prominent role.[1039] Meanwhile, in the EU 90% of competition cases stem from public enforcement initiatives.[1040] Anyhow, and

[1039] R.H. Lande and J.P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, University of San Francisco Law Review, 2008, 42, 4, 897.
[1040] G.A. Benacchio, *Il private enforcement del diritto europeo antitrust: evoluzione e risultati*, in L.F. Pace (Ed.), *Dizionario sistematico del diritto della concorrenza*, Cedam, 2020, 21; R. Chieppa,

maybe in light of the just mentioned data, in the first decade of the current century the EU stressed the importance of private enforcement of competition law through various soft law documents.[1041] Finally, in 2014 it enacted Directive 104/2014,[1042] aimed at addressing the most problematic aspects of this tool, with the purpose of allowing it to show its true potential. The main innovations introduced by this Directive concerned the subject entitled to bring a competition law case, the evidentiary value of competition Authorities' decisions, the access to evidence gathered by the same Authorities in public enforcement proceedings and the passing-on issue. Anyhow, no provisions were introduced about the very important relationship between private enforcement of competition law and collective redress (although they were contained in the previous Green[1043] and White[1044] Papers). The latter instrument, on the contrary, plays a fundamental role in the U.S. context, which, as we have anticipated, might be considered the most complete private enforcement system.[1045] Nonetheless, as we will see just below, some changes are needed also in the U.S., due to a stricter approach recently adopted by the U.S. Judiciary.

In conclusion of this introduction, it is however necessary to outline why private enforcement is so important and, briefly, what are its pros and cons. As a starting point, it is worth specifying that private enforcement's importance relies upon the

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Il nuovo assetto istituzionale del private antitrust enforcement in Italia e nell'Unione europea: la complementarietà tra private e public enforcement, in G.A. Benacchio and M. Carpagnano (Eds.), *Assetti istituzionali e prospettive applicative del private antitrust enforcement nell'Unione europea, Atti del VI Convegno biennale Antitrust di Trento, 6-8 aprile 2017*, Editoriale Scientifica, 2018, 40.

[1041] Green Paper on Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 19 December 2005, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN (accessed 5 October 2021); White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2 April 2008, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN (accessed 5 October 2021). See also the report commissioned to the law firm Ashurst by the EU Commission, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, 31 August 2004, available at https://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf (accessed 5 October 2021).

[1042] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union, published in OJ 5 December 2014, L 349.

[1043] Commission Green Paper, cit., point 2.1.

[1044] Commission White Paper, cit., point 2.5.

[1045] About antitrust class actions in the U.S. see D.F. Broder, *U.S. Antitrust Law and Enforcement*, cit., 209-212.

fact that it establishes a sort of diffuse surveillance on the respect of competition provisions. This concept is well portrayed by the representation, in the U.S. system, of a private party filing a competition claim as a 'private attorney general'. Anyhow, thus not reaching this critical mass in the EU, a complementary application of competition provisions in the context of private lawsuits may well increase the competition caselaw, thus refining the relevant tool, as it may also bring to a better awareness of the benefits of competition and to an increase in the deterrence level. However, there are not only positive aspects. A negative side effect might be the less attractiveness of leniency programs in a system where a well-functioning private enforcement is present. In fact, a cartel's member willing to cooperate with competition Authorities in order to not receive a fine might change its mind in case its leniency application could cause it to pay a very high amount of damages as a private action's result. It is just in this context that the German Bundeskartellamt's Chair Andreas Mundt suggested the establishment of a sort of immunity from private actions for firms which applied for leniency.[1046] It is evident that such a solution raises several issues, such as why consumers cannot sue a company which caused them harm. Of course, they can sue the other members of the cartel, but it might not be completely fair that a firm participating in a cartel would not pay anything for it. In this sense, leniency may become so attractive that firms could use it as a business strategy in order to put some competitors off the market thanks to antitrust enforcement. Of course, a medium point between the reasons of civil liability and those of a well-functioning public enforcement might be found and the German solution is one of them.

However, the main hurdles that consumers willing to start a private lawsuit face rely on the evidentiary threshold they have to satisfy in order to succeed in their action. In this sense, power and information asymmetries play a prominent role, as consumers have not the availability of corporate documentation and they may also lack the financial resources to conduct the highly technical econometric and market analysis needed to establish an infringement of competition law. Given such a

[1046] J. Aranze, *Mundt touts immunity from damages for leniency applicants*, Global Competition Review, 10 September 2021, available at https://globalcompetitionreview.com/mundt-touts-immunity-damages-leniency-applicants (accessed 8 October 2021).

scenario, a complementary role between private and public enforcement appears essential, as private parties might benefit from the investigations conducted with the power of competition law Authorities. In such a manner, private parties might, at a certain extent, level their asymmetry vis-à-vis the opponent firms. Anyhow, this would not prove sufficient in order to perfectly put plaintiffs and defendants on the same level, and, at this purpose, tools such as collective redress and third-party litigation funding may prove fundamental, as we will see in this chapter's final part. Finally, it is worth reminding that the complementary relationship between private and public enforcement is not at the sole benefit of the former, but it is biunivocal. In fact, competition Authorities cannot pursue all the cartels or the abuses of dominant position present on the market, as they have limited resources, both human and financial. Consequently, a well-functioning private enforcement may well represent a viable alternative for cases that competition Authorities cannot deal, thus – by reverting to Thorelli's metaphor quoted in Chapter 3 – adding another police force to patrol the highways of competition. Therefore, an analysis of private enforcement's main problematic aspects will be conducted in the present chapter, with the aim of proposing the right solutions for improving this fundamental tool for competition law.

2. Private antitrust enforcement in the United States: The need for a conceivability standard

Private enforcement – as we have anticipated – constitutes a necessary tool for the application of U.S. antitrust provisions. In fact, as highlighted by the mentioned U.S. Committee on the Judiciary Report, *private enforcement plays a critical role in the nation's antitrust system*, as it *deters anticompetitive conduct and strengthens enforcement overall*.[1047] This high effectiveness is granted in particular by the 'treble damages' provision contained in the Clayton Act.[1048] Anyhow, the same

[1047] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 403, citing J.P. Davis and R.H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, Seattle University Law Review, 2013, 36, 3, 1269.
[1048] Clayton Act, 15 U.S.C. § 15(a) (2009). The same U.S. Supreme Court has recognised that treble damages are aimed at both punishing parties which violated antitrust provisions and deterring others

report points out that in the last decades succeeding in an antitrust case became significantly more difficult for private plaintiffs. Among the relevant 'barriers', the Committee includes the widespread use of forced arbitration clauses and the heightened pleading requirements set by the Courts.[1049] Having regard to the former, this allows firms to channel the proceedings in a favourable trail, as plaintiffs cannot benefit for the increased legal protection ensured by Court proceedings. However, also the public justice system does not offer a completely satisfying environment for private plaintiffs, as Courts have elaborated strict standards for establishing an antitrust injury or for the standing of private parties.[1050] Consequently, as the same Report – and so do we – recognises the critical role that also private enforcement can play in curbing platforms' anticompetitive behaviours, it suggests several improvements, and among them *lowering the heightened pleading requirement introduced in Bell Atlantic Corp. v. Twombly*.[1051] This reference ought to be better analysed.

Rule 8(a)(2) of the U.S. Federal Rules of Civil Procedure (FRCP)[1052] provides that a pleading filed to obtain relief must contain *a short and plain statement of the claim showing that the pleader is entitled to relief*. In case this requirement would not be met, the claim can be rejected following a 'motion to dismiss' according to Rule 12(b)(6) FRCP. However, the provision contained in Rule 8 FRCP is drafted in general terms and, consequently, this has led to different interpretations by the Courts, which have modified the threshold that private plaintiffs may satisfy in order to file a claim. In particular, after a first interpretative line aimed at easing citizens' access to remedies, a more restrictive interpretation has followed, just after the *Twombly* judgment.

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from doing so. See U.S. Supreme Court, decision 15 October 1984, *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), at 635. See also A.A. Foer and R.M. Stutz (Eds.), *Private Enforcement of Antitrust Law in the United States. A Handbook*, Edward Elgar, 2012, 236.

[1049] U.S. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations*, cit., 403-404.

[1050] *Ibidem*, 404.

[1051] *Ibidem*, 405. See U.S. Supreme Court, decision 21 May 2007, 550 U.S. 544 (2007), *Bell Atlantic Corp. v. Twombly*.

[1052] The U.S. FRCP (updated at 1 December 2020) are available at https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure (accessed 8 October 2021).

The Supreme Court's leading decision in this field – introducing the first and more favourable interpretation – was delivered in the 1957 *Conley v. Gibson* ruling.[1053] In this decision – not involving antitrust matters – the Court established that *in appraising the sufficiency of the complaint* it follows *the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts*.[1054] In a nutshell, until some evidence exists the claim cannot be dismissed ('conceivability' or 'no set of fact' standard). Of course, this approach firstly followed by the Supreme Court is particularly favourable for private plaintiffs willing to file a claim, especially in antitrust stand-alone cases, where the main difficulty for private parties is finding the necessary evidence in order to sustain their action, due to the information and power asymmetries characterising the relationship between firms and consumers. However, as anticipated, this favourable approach was overruled by the 2007 *Bell Atlantic Corp. v. Twombly* decision.[1055] This decision stemmed from a class action filed against an alleged cartel in the telecommunication sector. The plaintiffs affirmed the existence of a parallel behaviour among the defendants. Anyhow, in order to file an action under Section 1 of the Sherman Act, a parallel behaviour in itself is not sufficient, as an effective agreement among the parties shall be proved.[1056] The claim was first dismissed by the U.S. District Court for the Southern District of New York,[1057] but it was then allowed by the Court of Appeals for the Second Circuit.[1058] Then, the Supreme Court rejected the Court of Appeal interpretation and affirmed that the no set of facts standard outlined in *Conley* after 50 years *has earned its retirement*.[1059] In 'retiring' the *Conley* standard, the Court introduced the new 'plausibility' standard, affirming that the plaintiffs' claim ought

[1053] U.S. Supreme Court, decision 18 November 1957, *Conley v. Gibson*, 355 U.S. 41 (1957).
[1054] *Ibidem*, at 45.
[1055] In *Twombly*, at I, he Judges stressed that they *granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct […] and now reverse*. A.A. Foer and R.M. Stutz, *Private Enforcement of Antitrust Law in the United States. A Handbook*, cit., 159, 163-164; D.A. Herman and S.B. Sacher, *An Economic Analysis of Twombly/Iqbal with Application to Antitrust*, Journal of Competition Law & Economics, 2015, 11, 1, 110-112.
[1056] S. Dodson, *Comparative Convergences in Pleading Standards*, University of Pennsylvania Law Review, 2010, 158, 2, 457.
[1057] U.S. District Court for the Southern District of New York, decision 8 October 2003, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003).
[1058] U.S. Court of Appeals for the Second Circuit, decision 3 October 2005, *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 119 (2d Cir. 2005).
[1059] 550 U.S. 544 (2007), at II B.

to be dismissed as they *have not nudged their claims across the line from conceivable to plausible*.[1060] In substance, the Court established that the allegation of a parallel conduct was not sufficient, as it is requested to show that the defendants were part of a cartel and that they did not act independently.[1061] In particular, the Court established that *factual allegations must be enough to raise a right to relief above the speculative level*, which means that the pleading must contain something more than a statement of facts creating a speculation about the plaintiffs' right of action.[1062]

The standard expressed in *Twombly* was then confirmed and extended two years later in the *Ashcroft v. Iqbal* decision (not involving antitrust matters),[1063] where the Supreme Court established that the *Twombly* decision, although delivered in an antitrust case, represents the Supreme Court's *interpretation and application of Rule 8* and consequently the Court's decision in *Twombly expounded the pleading standard for "all civil actions,"*.[1064]

The newly introduced pleading standard was then followed by lower courts. Indeed, the *Twombly* approach resulted in a generalised increase in the requirements which had to be satisfied to file a sufficient pleading. Example of this are the *Elevator* case decided by the Court of Appeals for the Second Circuit,[1065] as well the rulings issued by the District Court for the Eastern District of New York in *Air Cargo* and *LaFlamme v. Air France*.[1066] In all the cases, the action was rejected.[1067]

[1060] *Ibidem*, at III.
[1061] In particular, the *Twombly* decision, at II A, required that for establishing a sufficient complaint an agreement must be alleged. See W.H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, Antitrust Law Journal, 2017, 81, 2, 596.
[1062] 550 U.S. 544 (2007), at II B.
[1063] U.S. Supreme Court, decision 18 May 2009, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See also D.A. Herman and S.B. Sacher, *An Economic Analysis of Twombly/Iqbal with Application to Antitrust*, cit., 112.
[1064] 556 U.S. 662 (2009), at C 1. See also A. Petrasincu, *Discovery Revisited – The Impact of US Discovery Rules on the European Commission's Leniency Programme*, European Competition Law Review, 2011, 32, 7, 358.
[1065] U.S. Court of Appeals for the Second Circuit, decision 4 September 2007, *In Re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007).
[1066] U.S. District Court for the Eastern District of New York, decision 26 September 2008, *In Re Air Cargo Shipping Services Antitrust Litigation*, 2008 U.S. Dist. LEXIS 107882 (E.D.N.Y. 2008); decision 5 April 2010, *LaFlamme v. Air France*, 2010 WL 1292262 (E.D.N.Y. 2010).
[1067] See D. Petrasincu, *Discovery Revisited*, cit., 358-360.

What emerges from this new interpretation of the pleading standard is a greater difficulty for private plaintiffs to file an antitrust claim. Although *Twombly* and other cases dealing with this issue have more often regard to violations of Section 1 of the Sherman Act, such a restrictive standard might prove detrimental also for plaintiffs seeking relief under Section 2.[1068] Moreover, they may face even more difficulties in establishing a 'plausible' violation of Section 2, especially if features characterising digital markets are involved. Indeed, in stand-alone cases it will be particularly difficult for private parties to provide highly technical data about a platform allegedly illicit conduct. Therefore, the deterrent force of the 'private attorneys general' might result irremediably weakened. For this reason, and according to the Committee Report, we believe that returning to a less stringent pleading requirement, especially in cases involving platforms, may prove beneficial for rendering private enforcement central in the antitrust fight against dominant platforms' excessive market power. Indeed, the U.S. private enforcement regime, as we have previously outlined, is in the availability of all the necessary means in order to prove effective also against digital firms (*i.e.*, treble damages, an effective class action regime, together with a functioning TPLF system). Anyhow, these tools cannot properly express their effectiveness if most antitrust litigation fail to overcome the preliminary pleading phase.

3. Private enforcement of competition law in Europe: The need for more than a level playing field

In the European Union – as we have already anticipated – private enforcement constituted a 'niche' tool in competition law enforcement until the beginning of the XXI century. In fact, as pointed out by the 2004 Ashurst Study, the European private enforcement landscape was characterised by a situation of *astonishing diversity* across member States and *total underdevelopment*.[1069] Indeed, although the private parties' right to claim for damages was recognised by several judicial

[1068] The *Elevator* case, for instance, deals with violations of both Sections 1 and 2 of the Sherman Act.
[1069] Ashurst Study, cit., 1.

decisions, the necessary positive regulation of this tool was lacking, leading to very broad differences across Member States, which prevented the creation of the so-called 'level playing field' needed for a tool that might have proven particularly beneficial for the maintenance of competition in the internal market. Moreover, such differences led to a situation where forum shopping was largely diffused and in which situations sharing the same factual background could have received different judicial outcomes depending on the member State in which the case was litigated.[1070] Such a scenario could have reached the incredible result of harming by itself the competition on the internal market.

The European Union private enforcement regime shall be deemed a 'creation' of the Court of Justice. In fact, in absence of a Regulation or a Directive on the matter, the right to claim damages arising out from an anticompetitive behaviour was first recognised by the ECJ *BRT Sabam* decision, back in 1974.[1071] In this ruling the ECJ stated that *as the prohibitions of Articles 85 (1) and 86 [now 101 and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard*.[1072] Indeed, as pointed out by the same Court, not recognising this possibility for national Courts *would mean depriving individuals of rights which they hold under the Treaty itself*.[1073] In practice, the Court recognised the direct applicability of Articles 101 and 102 TFEU.[1074] Anyhow, following the *BRT Sabam* ECJ *dictum*, private enforcement did not reached the critical mass needed in order to constitute a valid complementary tool to public enforcement. This was determined by the abovementioned lack of positive regulation and by the different solutions adopted by the various member States' Courts. For instance, the Italian Corte di Cassazione recognised the right of

[1070] M. Carpagnano, *Quot regiones, tot mores. Analisi comparata di alcuni casi recenti in Europa in materia di private antitrust enforcement*, in G.A. Benacchio and M. Carpagnano (Eds.), *Il private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali. Atti del II Convegno di Studio tenuto presso la Facoltà di Giurisprudenza di Trento, 8-9 maggio 2009*, Cedam, 2009, 244.
[1071] European Court of Justice, decision 30 January 1974, case C-127/73, *Belgische Radio en Televisie v. SV Sabam and NV Fonior*.
[1072] *Ibidem*, para 16.
[1073] *Ibidem*, para 17.
[1074] G.A. Benacchio, *Il private enforcement del diritto europeo antitrust: evoluzione e risultati*, cit., 19.

individuals to seek damages stemming from an anticompetitive behaviour – regulated by article 33 of the 1990 Italian Competition Act[1075] – only in 2005, whilst before it held that such a right was granted to firms only.[1076] For the 'awakening' of private enforcement in the EU was necessary to wait until 2001, when the ECJ issued the *Courage* landmark decision.[1077] Here the Court reaffirmed the *BRT Sabam* principle according to which Article 101 and 102 TFEU produce direct effects that national Courts must safeguard,[1078] as it needed to obtain the 'effet utile' of the concerned TFEU articles.[1079] Indeed, the Court stressed that the recognition of the individuals' right to claim antitrust damages *strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*.[1080] And, with regard to the active standing regarding such a right, the Court granted it upon *anyone*[1081] or *any individual*.[1082] The ECJ soon reiterated these statements in its subsequent *Manfredi* decision.[1083] This approach was also implemented by the 'modernisation' Regulation 1/2003, whose Article 6 explicitly affirms that *national courts shall have the power to apply Articles 81 and 82 of the Treaty*.

Anyhow, *Courage* and *Manfredi* – if read also in conjunction with the Ashurst report – portrayed a situation where private enforcement was recognised and viewed as a valid instrument, but, due to the lack of common rules governing the matter, it did not reach the effectiveness needed to play a useful role in maintaining a workable competition in the common market. Therefore, a very interesting and

[1075] Law 10 October 1990, no. 287, published in GU 13 October 1990, no. 240.
[1076] Corte di Cassazione, Sezioni Unite, decision 4 February 2005, no. 2207. See also G.A. Benacchio, *Il private enforcement del diritto europeo antitrust: evoluzione e risultati*, 23-24; A. Piletta Massaro, *Pratiche concordate contrarie al diritto antitrust: il caso delle fideiussioni omnibus redatte secondo lo schema ABI*, Rivista di Diritto Bancario, 2020, 4, 262.
[1077] European Court of Justice, decision 20 September 2001, case C-453/99, *Courage Ltd v. Bernard Crehan*.
[1078] *Ibidem*, para 23.
[1079] *Ibidem*, para 26.
[1080] *Ibidem*, para 27.
[1081] *Ibidem*, para 22.
[1082] *Ibidem*, para 24. See also A. Piletta Massaro, *Private antitrust enforcement e legittimazione ad agire degli enti*, Giurisprudenza Italiana, 2020, 12, 2693.
[1083] European Court of Justice, decision 13 July 2006, joined cases from C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA et al.*, in particular paras 39, 61 and 63.

active debate flourished on this topic, leading to various conferences and to the publication of the abovementioned Green and White Papers by the European Commission, aimed at understanding the right solutions needed for establishing a 'level playing field' for private enforcement in the EU. However, only in 2014 the private enforcement Directive was finally enacted. As the title of the present paragraph outlines, Directive 104/2014 represents a fundamental step towards the harmonisation of national private antitrust enforcement regimes, as it regulates this tool's main features. However – especially in the era of tech giants – something more than a 'level playing field' is necessary. Among the most important issues addressed by Directive 104/2014 it is worth mentioning active standing, the value of public enforcement decisions in front of national Judges, as well as the possibility of making use of evidence collected by public enforcers in private lawsuits.

First of all, it is necessary to mention that Directive 104/2014 recognise the role of private enforcement as a necessary complement to public enforcement. In fact, Recital 3 – quoting the analysed ECJ's decisions – affirms that Articles 101 and 102 TFEU produce direct effects between individuals, thus creating rights for them which national Courts must protect. In addition, the same recital plainly states that *national courts thus have an equally essential part to play in applying the competition rules (private enforcement)*, as *they protect subjective rights under Union law*.

Having regard to active standing, Recital 3 of the Directive expressly states that the right to file a private enforcement claim is granted to both individuals – including consumers and undertakings – and public authorities. Moreover, Recital 13 specifies that *the right to compensation is recognised for any natural or legal person – consumers, undertakings and public authorities alike – irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority*. This concept is also echoed by Articles 1 and 3, specifying that the right to claim full compensation for harm caused by an infringement of competition law is ensured to *anyone* (Article 1) or *any natural or legal person*

(Article 3).[1084] Having regard to active standing is worth mentioning that the ECJ, in the 2019 *Otis* decision,[1085] clarified that also a public authority (in that case, the Land Oberösterreich) which suffered harm as it provided an higher amount of money in subsidies because of the existence of a cartel it is entitled to file a claim. Indeed, the Court affirmed that *Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel agreement, those persons were unable to use that difference more profitably*.[1086] Related to the standing issue is the possibility of indirect purchasers to obtain damages for an increase in price 'passed on' to them along the value chain (the so called 'passing-on'). Passing-on can be used both as a defence and as a 'sword'. The former refers to the possibility of a defendant to not being condemned as the claimant passed on the overcharge stemming from the infringement of competition rules. This possibility is expressly recognised by Article 13 of Directive 104/2014. However, having regard to the 'active' passing-on, Article 12 of the Directive recognises the right to full compensation for *anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer*. Article 14 better specifies the conditions according to which national legislations shall ensure such a right. Moreover, the ECJ recently specified, in the *Tibor-Trans* decision,[1087] that, even in case a private action is directed against a defendant without direct contractual relationships with the plaintiff, the place where the harmful event occurred – according to Regulation 1215/2012 on jurisdiction in

[1084] A. Piletta Massaro, *Private antitrust enforcement e legittimazione ad agire degli enti*, cit., 2693.
[1085] European Court of Justice, decision 12 December 2019, case C-435/18, *Otis GmbH et al. v. Land Oberösterreich et al.*
[1086] *Ibidem*, para 34. See also A. Piletta Massaro, *Private antitrust enforcement e legittimazione ad agire degli enti*, cit., 2693.
[1087] European Court of Justice, decision 29 July 2019, case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV*.

civil and commercial proceedings[1088] – is *the place where the market prices were distorted and in which the victim claims to have suffered that damage*.[1089]

Having regard to issues related to evidence in private enforcement cases, Directive 104/2014 regulates both the collection of evidence contained in a competition Authority's file and the evidentiary value that shall be recognised to decisions taken in the public enforcement field. With reference to the latter, Article 9 of Directive 104/2014 states that a final decision issued by a national Authority or Court is binding on the Court (of the same member State) judging the related private enforcement follow-on action as for the existence of an infringement of competition law. Anyhow, the Directive's text does not properly clarify the limits of such a binding value. A correct and more complete formulation of this rule can be found at article 7 of the Italian legislative decree implementing Directive 104/2014.[1090] This states that the Judge is bound by the public enforcement decision with regard to the existence of an infringement and its nature, but not about causation and the existence of a damage against the plaintiff. Therefore, these profiles must be proved by the plaintiff itself. Finally, the same Directive's Article 9 recognised 'prima facie' evidentiary value to decisions issued by other member States' competition Authorities. As it results evident, Article 9 of the Directive extended to decisions issued by national Authorities the content of Article 16 of Regulation 1/2003, which establishes the binding effect on national Courts of decisions issued by the European Commission.

Turning to the disclosure of evidence contained into a national Authority's file, in brief, Article 6 of Directive 104/2014 provides for a three-tier gradation scheme. As it is understandable, the risk is that of undermining public enforcement procedures by disclosing sensitive documentation, such as leniency notices. In fact, leniency programmes might prove less attractive if a company which applied for leniency may be sued – as it happens currently, contrary to the abovementioned

[1088] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, published in the OJ of the EU 20 December 2012, L 351.
[1089] *Ibidem*, para 37. See also A. Piletta Massaro, *Giurisdizione e passing-on nel private antitrust enforcement: la decisione della CGUE*, Giurisprudenza Italiana, 2020, 5, 1130.
[1090] Legislative Decree 19 January 2017, no. 3, published in OJ 19 January 2017, no. 15.

Bundeskartellamt's proposal – and the self-accusing documentation submitted to the competition watchdog could be used against this firm. Therefore, according to Directive 104/2014, these documents, together with settlement submissions, cannot at any time be disclosed for the purposes of a private enforcement proceeding (the so-called 'black-list', article 6, paragraph 6). Meanwhile, other items, such as withdrawn settlement submissions or documents prepared for the purpose of a specific proceeding can be disclosed only after the latter is closed (the so-called 'grey list', Article 6, paragraph 5). All the other documents, upon request of a national Court and according to the guarantees contained in the same Article 6, can be disclosed. In this context, it is also worth mentioning that the Directive grants broader powers to national Judges for obtaining the disclosure of evidence from the defendant (Article 5) and it recognises the possibility for Courts to seek advice from competition Authorities as *amicus curiae* with respect to the quantification of damages profile (Article 17).

Considering this brief analysis of Directive 104/2014, it is possible to affirm that since its enactment and the relevant implementation at the member States level,[1091] the desired 'level playing field' across the internal market in private antitrust enforcement has been built. Moreover, in the following years, the ECJ has intervened with several decisions, such as the abovementioned *Tibor-Trans* and *Otis* ones, to better address and clarify some controversial and detailed points in the private enforcement field. Other clarifications by the ECJ includes the *Skanska* decision,[1092] which specified that the acquiring company of a firm can be sued for damages, the *Cogeco* ruling[1093] about limitation in the Portuguese system, as well the recent *Sumal* judgement,[1094] which established that a subject harmed by an anticompetitive conduct can file a claim for damages against a subsidiary of the

[1091] For an overview on Directive 104/2014's implementation phase at the member States level, see B. Rodgers, M. Sousa Ferro, F. Marcos (Eds.), *The EU Antitrust Damages Directive. Transposition in the Member States*, Oxford University Press, 2018.
[1092] European Court of Justice, decision 14 March 2019, case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al.*
[1093] European Court of Justice, decision 28 March 2019, case C-637/17, *Cogeco Communications Inc. v. Sport TV Portugal SA et al.*
[1094] European Court of Justice, decision 6 October 2021, case 882/19, *Sumal SL v. Mercedes Benz Trucks España SL*.

infringing company in case these companies constitute a single economic unit.[1095] As a consequence, it can be affirmed that during the last decade private enforcement's development in the EU showed an incredible pace, needed to tailor a common framework of rules that before were developed by the ECJ and by national Courts.

Anyhow, although praising the progresses that we have just outlined, we deem that an additional step is needed to really establish a private enforcement regime that may prove deterrent for infringing companies and beneficial for consumers and the market as a whole. Moreover, these innovations appear particularly needed in this time, characterised by the threats brought to competition by digitalisation. The following paragraphs will respectively address the topic of collective redress and third-party litigation funding. These tools, in our view, are the innovations needed to really empower private enforcement of competition law in the EU.

4. Collective redress as a fundamental complement for private enforcement of competition law in the EU

Collective redress, although was addressed by the European Commission's Green and White Papers, was not regulated by Directive 104/2014. As a result, the *persisting collective action problem* in private antitrust enforcement – referred to by Van den Bergh in a seminal article published in 2013[1096] – remains. This legislative choice left the field open to what can be defined a regulatory competition regime among the various member States' models,[1097] as this represents – when it leads to a 'race to the top' among the national systems – one of the best alternatives to direct harmonisation.[1098] Indeed, such a regime would of course lead the best

[1095] *Ibidem*, para 67.
[1096] R. Van den Bergh, *Private Enforcement of European Competition Law and the Persisting Collective Action Problem*, Maastricht Journal of European and Comparative Law, 2013, 20, 1, 12.
[1097] A. Piletta Massaro, *The Italian Class Action Reform: A Redesigned Tool Beyond Consumer Law*, European Review of Private Law, 2020, 4, 843-844, 861-863.
[1098] G.A. Benacchio, *Diritto Privato della Unione Europea*, Cedam, 2016, 150; L. Antoniolli Deflorian, *Il formante giurisprudenziale e la competizione fra il sistema comunitario e gli ordinamenti interni: la svolta inefficiente di Faccini Dori*, Rivista Critica del Diritto Privato, 1995, 735.

systems to be 'awarded' by the stakeholders' investments, thus becoming in practice a model for Countries having less effective legislation in force.[1099]

However, the importance of collective redress in the private antitrust enforcement context cannot be undervalued. Thus, the exclusion of this tool from the directly harmonised 'level playing field' reached through Directive 104/2014 cannot be praised. As a matter of fact, cases stemming from competition law infringements often involves a plethora of small consumers as harmed parties, who face one or some big corporations. The latter are in the availability of large financial resources, which can make the difference in an antitrust case – especially if stand-alone – as the technicality of the issues at stake might prove in favour of the party having more resources.[1100] Given this premise, it would be crucial for private plaintiffs to 'merge' their actions, as very often antitrust violations generate a high amount of identical 'small claims'. As a result, the existence of a functioning collective redress scheme may result beneficial for small claimants, as their 'merged' power can equal that of infringing companies. In addition, this can also lead to a more efficient claim management by the judiciary.[1101] Finally, the existence of a harmonised regime is of paramount importance across the internal market, as a fragmented system, constituted by different models across member States, may favour forum shopping, thus resulting in increased difficulties for consumers harmed by anticompetitive conducts.

The European approach towards collective redress saw different phases during the last decade: First, a Directive on consumer collective redress, limited to injunctive relief, was enacted in 2009.[1102] Then, in 2013 the Commission issued a

[1099] G. Alpa, *La competizione tra ordinamenti: un approccio realistico*, in A. Zoppini (Ed.), *La concorrenza tra ordinamenti giuridici*, Laterza, 2004, 51.
[1100] Moreover, also out of the specific competition law context, consumers, in case they have a 'small claim' and they cannot join a collective action, do not file a lawsuit also due to the high cost of judicial procedures vis-à-vis the small amount of the damage suffered (which, however, result in a great profit for the infringing companies, as the small harm caused to a consumer shall be evaluated on the scale of all the harmed consumers). On this point see C. Poncibò, *Prime riflessioni sulla tutela giuridica integrata dei diritti dei consumatori nel diritto europeo*, in P. Cendon (Ed.), *Responsabilità civile – Volume primo*, Cedam, 2020, 825.
[1101] A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, Review of the Kopaonik School of Natural Law, 2021, 1, 96.
[1102] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, published in OJ 1 May 2009, L 110/30.

Recommendation,[1103] but after that initiative the field was left to regulatory competition. At the national level, Italy adopted its first collective redress model in 2007,[1104] introducing Article 140-*bis* into the Italian Consumer Code.[1105] Anyhow, this model never became effective, and it was substituted by a renewed one in 2009,[1106] subsequently amended in 2012,[1107] by reason of scarce effectiveness levels. Then, in 2019, a reform introduced a brand-new model, aimed at delivering a more effective tool also outside the consumer law field.[1108] At this purpose, the new provisions, which entered into force only in May 2021, are contained in the Italian Civil Procedure Code (CPC). In a similar vein, the French legislator introduced in 2014 the so-called *action de groupe*,[1109] as the previous *action en représentation conjointe* proved ineffective.[1110] In 2015 also the UK, in the specific competition law context, amended the collective redress scheme contained in the Competition Act 1998.[1111] Finally, it is worth mentioning the reform introduced in 2017 (and entered into force in 2018) by the Slovenian legislator, which closely

[1103] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396EU), published in OJ 26 July 2013, L 201/60.
[1104] Article 2, subsection 446, of Law 24 December 2007, no. 244, published in OJ 28 December 2007, no. 300.
[1105] Legislative decree 6 September 2005, no. 206, published in OJ 8 October 2005, no. 235.
[1106] Article 49, subsection 1, of Law 23 July 2009, no. 99, published in OJ 31 July 2009, no. 176.
[1107] Article 6 of Law decree 24 January 2012, no. 1, published in OJ 24 January 2012, no. 19. Then converted into Law 24 March 2012, no. 27, published in OJ 24 March 2012, no. 71. For an exhaustive and reasoned overview (in English) on the previous Italian collective action regime see G. Afferni, *'Opt-In' Class Actions in Italy: Why are they Failing?*, Journal of European Tort Law, 2016, 7, 1, 82.
[1108] Law 12 April 2019, no. 31, published in OJ 18 April 2019, no. 92. For an overview (in English) on the newly introduced Italian collective action regime see A. Piletta Massaro, *The Italian Class Action Reform: A Redesigned Tool Beyond Consumer Law*, cit., 841; A. Piletta Massaro and C. Poncibò, *The Italian Government Adopts a Collective Action Reform Which Aims at Redesigning Proceedings Beyond Consumer Law*, Concurrences, e-competitions February 2020, article no. 95748, available at https://www.concurrences.com/en/bulletin/news-issues/february-2020/the-italian-government-adopts-a-collective-action-reform-which-aims-at (accessed 11 October 2021).
[1109] Law 2014-344 of 17 March 2014 (the so-called *Loi Hamon*), published OJ 18 March 2014, no. 0065, page 5400. The *Loi Hamon* added articles from L623-1 to L623-32 in the French consumer code. The latter legislative provisions are supported, in the context of the same French Consumer Code, by the regulatory provisions provided for by articles from R623-1 to R623-33.
[1110] Articles from L622-1 to L622-4 of the French Consumer Code. On its ineffectiveness and scarce use, see French Sénat, *L'action de groupe à la française: parachever la protection des consommateurs*, available at https://www.senat.fr/rap/r09-499/r09-4991.html (accessed 11 October 2021), where it is clearly affirmed that this action *did not reach any success*; Observatoire des Actions de Groupe et d'autres Actions Collectives, *Synthèse sur les actions en representation conjointe*, available at https://www.observatoireactionsdegroupe.fr/actions-collectives/actions-en-repr%C3%A9sentation-conjointe/ (accessed 11 October 2021).
[1111] Sections 47 A-E, Competition Act 1998, as amended by the Consumer Right Act 2015.

followed the 2013 Commission Recommendation and, as it will be analysed in the following paragraph 5, provided an organic discipline of third-party litigation funding in collective redress cases.[1112]

The main issues addressed by the various reforms concern the standing to bring a collective lawsuit, the possibility to join such an action and the scope of the relevant collective redress scheme. Having regard to the former, for instance, as the new Italian reform grants the right to start a collective claim to both representative associations and each class member (Article 840-*bis* CPC), on the contrary, the French *action de groupe* envisages this right to registered consumers associations only (Article L623-1 *Code de la consommation*). However, the most interesting point deals with how class members can join a collective action, as this constitutes a critical feature for a collective redress model's effectiveness. As it is well known, the two main adhesion mechanisms are the so-called 'opt-in' and 'opt-out'. In brief, as far as an opt-out scheme (the 'classic' one is contained in Rule 23 of the U.S. FRCP) is concerned, class members are automatically included into the class perimeter after a decision on the merits of the case is issued, without their express adhesion. Therefore, if they do not want to be included into the class, they must express their intention to 'opt-out'. Contrarywise, where an opt-in scheme is in force, private parties willing to be included into the class perimeter must expressly request such inclusion. Of course, an opt-out scheme may prove more beneficial for consumers, but, on the other side, it could result more difficult to manage, especially, as we will see, if a third-party funding agreement is present. Moreover, an opt-in mechanism reaches a higher degree of compliance with the principle of private autonomy in filing a lawsuit.[1113]

[1112] Law on Collective Actions (*Zakon o kolektivnih tozbah – ZkoIT*), published in OJ 6 October 2017, no. 55. See C.I. Nagy, *European Models of Collective Actions*, in C.I. Nagy (Ed.), *Collective Actions in Europe*, Springer, 2019, 71; A. Piletta Massaro, *Towards an EU-Wide Collective Redress Model: An Opportunity for Strengthening Eastern Europe Countries' Access to Justice*, 33rd Kopaonik Conference's articles collection, *Zbornik radova 33. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović, Unifikacija prava i pravna sigurnost*, Book IV, 2020, 187-188; A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, 105-108.

[1113] C.I. Nagy, *European Models of Collective Actions*, cit., 24-30; A.P. Mikroulea, *'Collective Redress' in European Competition Law*, Zeitschrift für Wettbewerbsrecht, 2016, 14, 4, 392, 406–408.

Given that if an opt-out mechanism is adopted no particular formalities for joining the class are necessary, the peculiarities of how class members can effectively join the action play a crucial role in an opt-in scheme. In particular, the moment when private parties can express their intention to adhere is fundamental. At this purpose, again, a comparison between the Italian – especially the old one – and the French model may be telling. For instance, the previous Italian model allowed consumers to join the action only during a specified time frame before the main proceeding was decided on the merits. This approach – together with other procedural hurdles – did not incentivise consumers to adhere, as a preliminary adhesion implies a higher risk with regard to the action's success probabilities. Contrarywise, the new reform, by transplanting a key feature of the French model, allowed also a postponed adhesion window. Indeed, the *action de groupe* can be viewed as composed by two main phases, an 'ascending' and a 'descending' one: The first comprehend the start of the action until the judgement on the merits, whilst the second, starting after this decision, has regard to the adhesion of group members and the consequential award of damages. In fact, Articles from L623-7 to L623-9 of the *Code the la Consommation* govern this 'postponed opt-in' mechanism, by providing that the judge fixes the deadline until when class members can join the action and that the infringer must pay the necessary publicity means to inform about the decision on the merits' outcome (of course, in case an infringement by the defendant has been found). In a similar shape, the new Italian reform, thus correcting one of the worst features of the previous legislation, adopts an *action de groupe*-shaped two-phase proceeding and allows class members to join the action both at the initial stage (Article 840-*quinquies*, CPC, as in the previous model) and after the decision on the merits (Articles 840-*sexies* and 840-*septies*, CPC). As it appears evident, having the possibility to join the action after the Court's final decision finds a very effective equilibrium point between opt-in and opt-out. Indeed, the disincentives of opt-in are overcome, as private parties join the action when they know that this was successful on the merits, and they need only to show that they are entitled to be included into the relevant class perimeter. On the other side, this mechanism also finds a solution to the management concerns raised by a pure opt-out mechanism.

Reverting to the scope of a class action model, this was initially conceived as a tool needed in the consumer law field only. In line with this assumption, the first previous Italian model and the *action de groupe* were available in the consumeristic field only. Competition law was included into the scope of these systems, although the French *action de groupe* is available for consumers harmed by a competition law infringement only if this was previously ascertained by a final decision issued by the Autorité de la Concurrence, the European Commission or another EU member State's competition Authority (Articles L623-24 and L623-25, *Code de la consummation*).[1114] As a consequence, in France this allows collective actions in the form of follow-on claims only. Of course, we deem the possibility to file also stand-alone collective actions necessary to empower private antitrust enforcement. Moreover, thinking that mass claims can occur only in the consumeristic field appears now rather simplistic. Consequently, the current trend at the European national level appears to move towards an enlargement of the collective redress schemes' scope. In this sense, the new Italian reform is available to everyone, and, at this purpose, the collocation in the general CPC is symbolic. In addition, although the 'original' *action de groupe* is related to consumer law issues, in 2016 the French legislator enacted the *Loi de modernisation de la justice du XXIe siècle*,[1115] introducing a common procedural framework (based upon the *action de groupe*'s one) for collective redress in the fields of health, environment, labour discrimination and protection of personal data.[1116] In any case, despite this innovative effort taken by the French legislator, an organic and 'open clause' solution, as adopted by the Italian legislator in 2019, appears preferable, as it provides a simple legislation that, without any limitation, is available for all mass

[1114] E. Claudel, *La procédure d'action de groupe explicitée*, RTD Com., 2015, 81.
[1115] *Loi 2016-1547 de modernisation de la justice du XXIe siècle*, *titre* V, which introduced, in the field of collective actions, articles from 848 to 849-20 in the French code of civil procedure, as modified by the *Décret* 2019-1333 of 11 December 2019.
[1116] In particular: articles from L1134-6 to L1134-10 of the *Code du travail* for actions in the field of labour discrimination (compensatory and injunctive nature); article L142-3-1 of the *Code de l'environnement* in the environmental field (compensatory and injunctive nature); chapter III, title IV, Ist book of the *Code de la santé publique* in the health safety field (compensatory nature); article 37, *Loi* 78-17 of 6 January 1978 in the personal data protection field (injunctive nature).

torts, thus considerably incentivising the use of collective redress methods and increasing the deterrent effect on infringing companies.[1117]

In this scenario also the European legislator introduced a European representative action model. This was conceived as part of the so-called *New Deal for Consumers*[1118] and led to the adoption of Directive 1828/2020.[1119] This piece of legislation provided for a parallel collective redress scheme, which can be applied alternatively to the existing national models. Having regard to the main collective action schemes' features analysed above, this new model allows both an opt-in and an opt-out method[1120] and empowers qualified representative associations to bring claims on behalf of European consumers, also if cross-border claims are concerned. As it is plainly stated in Recital 1 of the Directive, the European legislator deemed this intervention needed as *globalisation and digitalisation have increased the risk of a large number of consumers being harmed by the same unlawful practice*. However, notwithstanding this declamation, the Directive is applicable only to the consumeristic filed and especially in specific matters listed in its Annex I. Surprisingly, competition law is not mentioned. It is almost impossible to find a reason for this choice that does not involve 'political' reasons, but not in favour of

[1117] A. Piletta Massaro, *Towards an EU-Wide Collective Redress Model: An Opportunity for Strengthening Eastern Europe Countries' Access to Justice*, cit., 186-187; European Consumer Organisation (BEUC), *Proposal for a Directive on representative actions*, 2018, 7-8, available at https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf (accessed 11 Ocotber 2021).

[1118] An overview of the *New Deal For Consumers* programme is available at https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law-new-deal-consumers_en (accessed 11 October 2021).

[1119] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in OJ 4 December 2020, L 409/1. For a more complete overview on the innovations brought by Directive 1828/2020, see A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, cit., 95.

[1120] Whilst opt-in is the only option for consumers not habitually resident in the member State where the relevant lawsuit has been filed (Article 9, paragraph 3). The exclusion of non-resident parties from the possibility to benefit of the opt-out mechanism has been adopted also by Article 30, paragraph 3, of the Slovenian *ZkoIT* and by Section 47B, point 11(b)(i) of the UK Competition Act 1998. It is also worth pointing out that previously EU institutions showed a preference for the opt-in mechanism, seen as a safeguard against the risk of abusive litigation: See points 21-24 of the 2013 Recommendation. Point 21 of the Recommendation also states that any exception to the opt-in principle 'by law or by court order, should be duly justified by reasons of sound administration of justice'.

European consumers.[1121] As pointed out in its advice on this Directive's draft, also the European Consumer Association (BEUC) *strongly suggest[ed] including damages resulting from infringements of competition in the scope of this directive*.[1122] It is indeed self-evident that infringements of competition law constitutes one of the major fields where mass torts are produced: For instance, we could cite the Italian car insurance cartel,[1123] as well as the well-known trucks cartel.[1124] Moreover, as we have already pointed out, dominant positions held by tech giants have a great potential of creating widespread damages among their users. We deem that the European legislator completely lost the point here and acted completely out of the trail characterised by a progressive development of private antitrust enforcement. The central assumption of this part is that this tool can really play a fundamental role in supporting the application of competition rules in the digital context, in line of the *multi-tool* approach delineated above. Recognising – as Recital 1 of the Directive did – that digitalisation may pose a problem to European consumers but thinking that competition has not a role to play in this game means not really understanding what digitalisation implies. Consequently, we the European legislator was urged to add a line mentioning competition law among the high number of subjects listed in Directive 1828/2020's Annex I. This issue partially found a solution with the enactment of the Digital Markets Act Regulation, as its Article 42 provides that *Directive (EU) 2020/1828 shall apply to the representative actions brought against infringements by gatekeepers of provisions*

[1121] A. Piletta Massaro, *Towards an EU-Wide Collective Redress Model: An Opportunity for Strengthening Eastern Europe Countries' Access to Justice*, cit., 182. Having regard to the political reasons that did not lead to the introduction of a provision regarding collective redress in Directive 104/2014 see B. Szupera, L.B. Varga, A. Gábri, B.G. Kovács, *Towards a harmonised collective redress mechanism for the private enforcement of EU competition law*, ERA Forum, 2020, paragraph 4.

[1122] BEUC, *Proposal for a Directive on representative actions*, cit., 8.

[1123] Autorità Garante della Concorrenza e del Mercato, decision 28 July 2000, case 8546 (I377), *RC Auto*, available at https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/9580ABD365B16616C12569420032D002/$File/p8546.pdf (accessed 20 October 2021).

[1124] European Commission, case AT.39824-*Trucks*, which led to a settlement decision on 19 July 2016, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8750_4.pdf (accessed 20 October 2021) and to the decision issued on 29 September 2017, published in a provisional non-confidential version available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8754_5.pdf (accessed 20 October 2021).

of this Regulation that harm or may harm the collective interest of consumers. Although this provision does not extend the possibility to apply Directive 2020/1828 to all private antitrust enforcement actions, it must be welcomed as a positive innovation, as it empowers consumers to file collective claims for breaches of competition rules in one of the most sensitive fields, *i.e.* digital markets. Moreover, as it will be analysed below, this addition may also unlock the potential of third-party litigation funding in collective actions started against digital gatekeepers for infringements of competition law.

Finally, it is worth mentioning also the issue of punitive damages, which are one of the most characteristic traits of the U.S. private antitrust enforcement regime. Although some national decisions recognised foreign rulings awarding this kind of damages,[1125] they appear really far from the European context, as both Directive 104/2014 (Recital 13 and Article 3, paragraph 3) and Directive 1828/2020 (Recital 10) explicitly affirm the compensatory nature of the actions they discipline.

5. A tool for easing access to private antitrust enforcement: Third-party litigation funding

We have already sustained that consumers may face several difficulties in sustaining a competition law claim, especially if it is filed as a stand-alone one. In fact, they may lack the financial resources to prove their claim without a previous public enforcement finding. Moreover, competition law is a subject generally handled by large law firms, which do not charge affordable fees, and the econometric evidence needed to sustain a case is often very technical and, consequently, not in the availability of the average European consumer. As a result, collective redress was provided as a possible solution to this issue, as the aggregation of a large number of harmed consumers could generate the necessary

[1125] See, *inter alia*, Corte di Cassazione, United Sections, decision 5 July 2017, no. 16601, *Axo Sport v. Nosa*; Cour de Cassation, First Civil Chamber, decision 1 December 2010, no. 1090. See also C. Salvi, *Le funzioni della responsabilità civile e il volto italiano dei danni punitivi*, Il Foro Italiano, 2018, I, 2504; B. Pozzo, *The Enforcement of Foreign Decisions Concerning Punitive Damages*, European Review of Private Law, 2018, 5, 661; M. Cannarsa, *The French Perspective on Punitive Damages*, European Review of Private Law, 2018, 5, 668.

economies of scale needed to sustain a competition law claim. However, this would still not be sufficient for a complete empowerment of private enforcement. Consequently, a 'plus factor' ought to be added and it is represented by third-party litigation funding (TPLF). This instrument – which also gained the attention of EU institutions, as showed by the recent report issued by the European Parliamentary Research Service[1126] – can of course work also in single claims, but it is the union between TPLF and collective redress that may provide consumers with a very powerful tool in competition law litigation.

In a nutshell, TPLF consists in an agreement between the plaintiff (or a group of plaintiffs) and a fund specialised in litigation financing for the purpose of a specific claim. This agreement may benefit both the parties: The claimant would not bear litigation costs (especially if they are high) and risks, as the funder will generally pay the costs occurring in case of defeat,[1127] whilst the funder is entitled to a percentage (which generally comprised between 20% and 50%) in case of success.[1128] Of course, several issues arise with regard to TPLF. The scholar debate on this instrument tries to address concerns related, among others, to the degree of influence that the funder might exercise on the claimant's decisions,[1129] and to the possibility to cap the funder's return percentage. Anyhow, it is worth pointing out that, as far as a proper regulation of TPLF is required and needed, excessive limitations and concerns appears superfluous. Indeed, from an access to justice and

[1126] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, March 2021, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf (accessed 11 October 2021).

[1127] *Ibidem*, 45, 66, 76-77. It is however necessary to specify that in absence of a specific regulation on the point, an 'hold harmless' provision, in the EU context, shall be contained in the relevant TPLF agreement, as the defendant has not a direct action against the funder for the recovery of procedural costs. Anyhow, in other systems, like in England and Wales, a direct action of the defendant against the funder is granted by Courts. See, for instance, Court of Appeal, decision 26 May 2005, *Arkin v. Borchard Lines Ltd & Ors*, [2005] EWCA Civ 655, where the Court limited the funders' liability to the financed sum (the so-called 'Arkin cap'). However, subsequently, the same Court of Appeal ordered the funder to pay the full amount of adverse costs in decision 25 February 2020, *Chapelgate Credit Opportunity Master Fund LTd v. Money & Ors*, [2020] EWCA Civ 246.

[1128] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 54-55.

[1129] *Ibidem*, 71-73. It is also worth reporting (see footnote 141 of the European Parliamentary Research Service report) that Article 1 of the Dutch Collective Damages Act (*WAMCA*), entered into force on 1 January 2020, provide safeguards in order to prevent a funder from having a leading influence on the claim management.

general deterrence perspective, it is worth having more consumers seeking 50% or 70% of the harm suffered instead of not trying to file their claim at all because they do not possess the necessary resources.[1130] Other general concerns have regard to a possible increase in abusive litigation. Again, this scenario appears unlikely, as the funder, before taking on a claim, performs a detailed due diligence to understand if the relevant lawsuit has a reasonable probability to succeed (do not forget that, in case of defeat in Court, the funder shall bear adverse litigation costs on behalf of the funded party).[1131] Consequently, an increase in abusive litigation appears highly unlikely. Rather, a responsibly regulated TPLF regime may well encourage merit worthy claims instead of meritless ones.[1132]

However, as TPLF, especially if combined with collective redress, may play a fundamental role in private antitrust enforcement, this interaction ought to be better scrutinised.[1133] In particular, two main issues emerge in this context: The first is linked to the possible conflict of interest arising out between the funder and the defendant, whilst the second has regard to the choice of the most suitable adhesion mechanism in funded collective actions.[1134] In addressing these concerns, reference will be made to both the 2013 Commission Recommendation on collective redress and to Directive 1828/2020. In fact, as it is true that whilst the former is not binding on member States and the latter does not govern on actions regarding infringements of competition law (with the exception constituted by Article 42 DMA), nothing can prevent member States to extend the Directive's regime to collective actions in the competition law field or to implement solutions suggested by the 2013 Recommendation, as the Slovenian legislator did while drafting the *ZkoIT*.

Having regard to the possible conflicts of interest and the 'responsible' nature of the funding agreement, the 2013 Recommendation, at point 14, required the claimant to declare to the Court the origins of the funding used for the proceeding.

[1130] *Ibidem*, 79, see in particular footnote 144.
[1131] *Ibidem*, 57, 64-65.
[1132] In a similar vein, see G.M. Solas, *Third Party Funding. Law, Economics and Policy*, Cambridge University Press, 2019, 231, 235-236.
[1133] It is also worth mentioning that Directive 104/2014, at article 2, point 4, allows the acquisition of claims by specialised vehicles (such as the well-known firm *Cartel Damages Claims*, *CDC*). See also G.M. Solas, *Third Party Funding. Law, Economics and Policy*, cit., 89.
[1134] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 77-81.

Moreover, point 15 of the Recommendation allows the Court to stay the proceeding in case a. of conflicts of interest between the funder and the plaintiff, b. the funder has insufficient resources to sustain its financial commitments vis-à-vis the plaintiff, and c. the claimant has insufficient resources to meet any adverse cost in case the action might fail. Moreover, point 16 provides that the funder shall be prohibited to a. exercise influence on the plaintiff's procedural decisions, including these on settlements, b. fund an action against a defendant who is competitor of the fund or on whom the funder is dependant, and c. charge an excessive interest on the funds provided. Quite similar provisions about conflict of interests are contained in Article 10 of Directive 1828/2020, although a rule about the interest charged by the funder is absent. At the national level, it is worth reporting that the Slovenian *ZkoIT* includes provisions on conflicts of interest drafted according to the 2013 Recommendation, and it also provides for a cap on the funder's maximum return percentage, limited at the Slovenian statutory interest rate (Article 59, paragraph 3). In this context, an alternative and more flexible approach has been adopted, outside Europe, by the Ontario Supreme Court, which, in the *Houle v. St. Jude Medical* decision stated that the Court has the power to check that *the third-party funder must not be overcompensated*.[1135] Although the Slovenian approach appears preferable from a legal certainty perspective, as it is based on a fixed percentage, the Canadian interpretation may instead favour a more flexible evaluation, based on the circumstances of the single case at stake which may prove beneficial for the TPLF's development.[1136]

An additional clarification needs to be provided about the disclosure of the funding agreement, expressly requested by Article 10, paragraph 3, of Directive 1828/2020. In fact, from the Directive's text, it is not clear when and in what manner such a

[1135] Ontario Superior Court of Justice, decision 29 August 2017, *Houle v. St. Jude Medical*, 2017 ONSC 5129, paras, 63, 80, 86-87, available at https://www.canlii.org/en/on/onsc/doc/2017/2017onsc5129/2017onsc5129.html (accessed 11 October 2021). See also U.S. Chamber Institute for Legal Reform, Uncharted Waters, *An Analysis of Third Party Litigation Funding in European Collective Redress*, October 2019, 27, 82-83, available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/Analysis_of_TPLF_Funding_in_the_European_Collective_Redress.pdf (accessed 11 October 2021).

[1136] A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, cit., 107.

disclosure shall occur, and it is unclear whether the party must declare only the existence of a TPLF agreement or also the name of the funder and the relevant agreement's details. Moreover, it is not clarified if such details shall be disclosed to the Court only or also to the counterparty.[1137] In absence of any specification on this last question, a viable approach may come from Rule 237 of the ELI-Unidroit *Model European Rules of Civil Procedure*,[1138] providing that disclosure shall be performed in favour of the Court and *insofar as appropriate, to the parties*.

Reverting to the topic of the most suitable adhesion mechanism for funded collective actions, whilst an opt-in mechanism might ease the management of the funding agreement, an opt-out scheme poses the risk of free riding. Indeed, class members automatically included into the class perimeter after the decision on the merit, may well attempt to receive their compensation without joining the relevant funding agreement (and without paying the funder's fee).[1139] In absence of indications from both the Recommendation and the Directive, a comparative analysis is necessarily required. As a starting point, in order to prevent the freeriding issue, the U.S. system relied on the unjust enrichment doctrine, which is commonly recognised by U.S. Courts with regard to lawyers' fees.[1140] According to this theory, class members cannot benefit from the action's positive outcome without paying the lawyer who worked to obtain it.[1141] Translating it to the TPLF field, some scholars have suggested to extend this approach with regard to funders. In a similar vein, in the Canadian State of Ontario, judges are granted the power to bind putative class members to the relevant TPLF agreements.[1142]

[1137] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 79.
[1138] ELI/Unidroit, *Model European Rules of Civil Procedure*, 2020, available at https://www.unidroit.org/wp-content/uploads/2021/06/English-integral.pdf (accessed 11 October 2021).
[1139] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 80; A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, cit., 109.
[1140] B.T. Fitzpatrick, *Can and Should the New Third-Party Litigation Finanicing Come to Class Actions?*, Theoretical Inquiries in Law, 2018, 19, 1, 117-118, see the case law reported in footnotes 24-26 therein.
[1141] *Ibidem*, 118.
[1142] *Ibidem*. See also J. Kalajdzic, P. Cashman, A. Longmoore, *Justice for Profit: A Comparatice Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, The American Journal of Comparative Law, 2013, 61, 1, 115-116.

The most organic solutions were adopted by the Australian system. Here TPLF in class actions was first allowed in 2006 by the High Court of Australia's *Fostif* decision.[1143] Since then, as tellingly pointed out by Legg and Hickey, TPLF *has become synonymous with class action litigation in Australia*.[1144] Focussing on the issue of TPLF and adhesion methods, the Australian experience offered various approaches. The first one is referred to as 'closed class' and was introduced by the Full Federal Court's 2007 *Multiplex* decision.[1145] In detail, this solution allows Courts to limit the class perimeter to members who signed the relevant TPLF agreement only. Anyhow, as it appears evident, this interpretation in practice transforms the traditional Australian opt-out mechanism into an opt-in one. Moreover, this solution increased the so-called 'parallel proceedings', *i.e.*, those initiated by members of the class which did not join the funded action. Of course, such a result is not advisable from an efficiency perspective, as it lowers the economies of scale characterising the collective redress tool.[1146] Consequently, the Australian judiciary found an alternative solution through the so-called 'common fund orders', introduced by the *Money Max* decision issued in 2016 by the Full Federal Court.[1147] This mechanism allows the Court to issue an order which

[1143] High Court of Australia, decision 30 August 2006, *Campbells Cash & Carry Pty Ltd v. Fostif Pty Ltd*, [2006] HCA 41. See also M. Legg and S.J. Hickey, *Class Actions in Australia*, in B. Fitzpatrick and R.S. Thomas (Eds.), *The Cambridge Handbook of Class Actions*, Cambridge University Press, 2021, 376; M. Legg, *Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach*, Civil Justice Quarterly, 2011, 31, 52; G.M. Solas, *Third Party Funding. Law, Economics and Policy*, cit., 41.

[1144] M. Legg and S.J. Hickey, *Class Actions in Australia*, cit., 375.

[1145] Federal Court of Australia, Full Court, decision 21 December 2007, *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Limited*, (2007) 164 FCR 275. See Australian Law Reform Commission (ALRC), *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, 67, point 2.72, available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf (accessed 11 October 2021); M. Legg and S.J. Hickey, *Class Actions in Australia*, cit., 377-379; M. Legg, *Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions*, cit., 57; R. Gamble, *Jostling for a Larger Piece of the (Class) Action: Litigation Funders and Entrepreneurial Lawyers Stake Their Claims*, Common Law World Review, 2017, 46, 1, 6-8; S. Voet, *The Crux of the Matter: Funding and Financing Collective Redress Mechanisms*, in B. Hess, M. Bergström, E. Storskrubb (Eds.), *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, 2016, 220.

[1146] M. Legg and S.J. Hickey, *Class Actions in Australia*, cit., 379; M. Legg, *Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions*, cit., 62.

[1147] Federal Court of Australia, Full Court, decision 26 October 2016, *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Ltd*, (2016) 245 FCR 191. See also European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 80-81; M. Legg and S.J. Hickey, *Class Actions in Australia*, cit., 379; M. Legg, *Litigation Funding of Australian Class Actions After*

authorises the funder's payment from the total sum awarded by the Court, notwithstanding the fact that class members signed the relevant TPLF agreement.[1148] The adoption of this solution was not pacific, as it appeared that the High Court of Australia ruled it out in the 2019 *Brewster* and *Lenthall* decision.[1149] Anyhow, if a detailed analysis of such ruling is performed, it results that this decision denied the Court's power to issue a common fund order only during the initial stage of a proceeding.[1150] Therefore, Courts still maintain the power to grant these orders at a later stage of proceedings. This was confirmed by the 2020 Full Federal Court decision in *Davaria*[1151] and by the New South Wales Court of Appeal ruling in the same *Brewster* case.[1152] In the end, it is also worth outlining that, given the evolving judicial praxis on the matter, the Australian Law Reform Commission (ALRC) report *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* suggested that common fund orders need to be supported by an express statutory power.[1153] Accordingly, the Parliamentary Joint Committee on Corporations and Financial Services recommended the Australian Government to legislate in order *to address uncertainty in relation to common fund orders*. Anyhow, it precises that *the availability of a common fund order at the end of a proceeding promotes outcomes which are reasonable, proportionate and fair for all class members as all who financially benefit from the class action are required to contribute to the cost occurred*.[1154] As anticipated, in absence of specific provisions on this matter

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the High Court Rejection of Common Fund Orders: BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45, Civil Justice Quarterly, 2020, 39, 4, 308.

[1148] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 80-81; M. Legg and S.J. Hickey, *Class Actions in Australia*, cit., 379; M. Legg, *Litigation Funding of Australian Class Actions After the High Court Rejection of Common Fund Orders*, cit., 309.

[1149] High Court of Australia, decision 4 December 2019, *BMW Australia Ltd v. Brewster & Anor and Westpac Banking Corporation & Anor v. Lenthall & Ors*, [2019] HCA 45.

[1150] *Ibidem*, points 53, 93, 125. See also M. Legg, *Litigation Funding of Australian Class Actions After the High Court Rejection of Common Fund Orders*, cit., 311-312.

[1151] Federal Court of Australia, Full Court, decision 3 November 2020, *Davaria Pty Ltd v. 7-Eleven Stores Pty Ltd*, [2020] FCAFC 183.

[1152] NSW Court of Appeal, decision 30 October 2020, *Brewster v. BMW Australia Ltd*, [2020] NSWCA 272.

[1153] ALRC, *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, cit., 99, point 4.35.

[1154] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, December 2020, 125, point 9.123, available at https://www.aph.gov.au/-/media/Committees/corporations_ctte/Litigation_Funding/Litigation_funding_and_the_regulation_

contained in Directive 1828/2020, these solutions – especially common fund orders – might prove helpful for member States during the Directive's implementation phase. A sort of 'green light' to common fund orders appears to be provided also by the abovementioned ELI/Unidroit *Model European Rules of Civil Procedure*. In fact, Rule 238, paragraph 2, states that in case a proceeding is successful, *the total amount of compensation received by the qualified claimant shall form a common fund*. In addition, the following paragraph 3 provides that the representative entity's costs and expenses *must be paid from the common fund before any distribution of compensation to group members*. Of course, it is logical to consider the funder's fee as included into the expression *costs and expenses*.[1155]

Finally, it is worth mentioning that national systems have also introduced alternative means for financing collective actions. For instance, Article 61, paragraph 1, of the Slovenian *ZkoIT*, provides that the plaintiff's lawyer can arrange a contingency fee agreement not exceeding 15% of the sum recovered through the concerned lawsuit. Moreover, this rate can be increased up to 30% in case the lawyer accepts to bear all the expenses in case of defeat. This solution was curiously defined by the U.S. Chamber Institute for Legal Reform as a *sui generis attorney third party litigation funding*.[1156] Also the new Italian collective action reform, although not providing for a properly defined contingency fees mechanism, introduced a rewarding remuneration for lawyers.[1157]

of the class action industry report.pdf?la=en&hash=688F6CEDD016BE31B03A75101A6C6AA3BAE29AB7 (accessed 11 October 2021).

[1155] European Parliamentary Research Service, *Responsible Private Funding of Litigation*, cit., 81; A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, cit., 113.

[1156] U.S. Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress*, cit., 73.

[1157] Article 840-*novies* CPC. See C. Consolo, *La terza edizione della azione di classe è legge ed entra nel C.P.C. Uno sguardo d'insieme ad una amplissima disciplina*, Corriere Giuridico, 2019, 6, 737; G. Ponzanelli, *La nuova class action*, Danno e Responsabilità, 2019, 3, 306; A. Piletta Massaro, *The Italian Class Action Reform: A Redesigned Tool Beyond Consumer Law*, cit., 859, 863.

6

Competition law and the *New Green Deal*

Antitrust enforcement also supports the green transition, by protecting the competition that drives companies to innovate more, and to operate more sustainably. This July, we fined a group of carmakers 875 million euros, for agreeing not to compete to produce cleaner cars. But at the same time, the rules shouldn't discourage companies from working together, to make their products more sustainable – especially when that cooperation doesn't have much effect on the way companies compete with each other.

In practice, that could involve companies setting joint standards for what counts as a green product, or pooling resources to speed up green innovation. It could even mean companies agreeing to cut dirty products out of their supply chains, without being forced to do that by regulation.

There's huge scope to set up these agreements in line with the antitrust rules. Many sustainability agreements just don't harm competition – like some agreements on open standards for green products, for instance. Others can be legal, even though

they do restrict competition, so long as the benefits they bring for consumers outweigh those restrictions.[1158]

After having analysed the interaction between competition law and sustainability in its social aspect in chapter 2, this chapter aims at casting light on the interaction between competition law and environmental sustainability. The debate around this topic is only at the initial stage and further research seems needed to draw satisfactory conclusions, but, especially since the last two years, it has stimulated a flourishing discussion, with a lot of papers published by scholars and Competition Authorities, together with interesting conferences on this matter.[1159] The central question is about whether competition law shall play a role in the construction of a more sustainable economy and society, and, in case of affirmative answer, how this role should be performed. In this chapter we will try to provide a portrait of the

[1158] European Commission's Executive Vice-President Margrethe Vestager, *Competition policy in support of the Green Deal*, speech delivered (by Inge Bernaerts, Director, DG Competition) at the 25th IBA Competition Conference, 10 September 2021, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en (accessed 19 October 2021). On the same topic, see also *Competition and sustainability*, speech delivered at the GCLC Conference on Sustainability and Competition Policy, Brussels, 28 October 2019, available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en (accessed 1 February 2021); *The EU Green Deal and competition policy*, speech delivered at the Renew Webinar, 22 September 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en (accessed 1 February 2021).

[1159] See, *inter alia*, S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, 2021; S. Holmes, *Climate change, sustainability and competition law*, Journal of Antitrust Enforcement, 2020, 00, 1; S. Holmes, *Climate change, sustainability and competition law in the UK*, European Competition Law Review, 2020, 41(8), 384-399; M.C. Iacovides and C. Vrettos, *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, Journal of Antitrust Enforcement, 2021, 00, 1; G. Monti and J. Mulder, *Escaping the clutches of EU competition law. Pathways to Assess Private Sustainability Initiatives*, European Law Review, 2017, 42(5), 635; G. Monti, *Four Options for a Greener Competition Law*, Journal of European Competition Law & Practice, 2020, 11, 3-4, 124; S. Kingston, *Greening EU Competition Law and Policy*, Cambridge University Press, 2011; E. Kloosterhuis and M. Mulder, *Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants*, Journal of Competition Law & Economics, 2015, 11, 4, 855; K. Majcher and V. H.S.E. Robertson, *The Twin Transition to a Digital and Green Economy: Doctrinal Challenges for EU Competition Law*, February 2021, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3778107_code3158787.pdf?abstractid=3778107&mirid=1 (accessed 19 October 2021).

abovementioned debate, together with the relevant proposals, and we will suggest our solutions.

1. The meaning of 'sustainability' and its constitutional foundations

The present work has underlined how competition law should not be a self-referential discipline. In chapter 2, in particular, we have identified an interlinkage between market power – a condition that competition law is called to curb – and rising inequalities. We have also suggested that, although other tools, such as taxation, may play a more important role in tackling inequalities, competition law has its role to play. Moreover, in chapters 3 and 4, we have highlighted how such a polycentric role of competition law – *i.e.*, fuelled by multiple goals other than the mere economic efficiency – is present in the foundations of both the U.S. antitrust law system and the EU competition law regime. In the present chapter, and in line with the current debate on sustainability, the focus will be placed on the role that competition law shall play in pursuing sustainability and, in particular, *environmental* sustainability. It shall be first underlined that this discourse is not unbound with the whole theme of this research. Indeed, more generally, sustainability is intended as a concept encompassing both environmental and social issues. Therefore, the debate about competition law and environmental sustainability shall be regarded as linked with the discussion about competition and wealth inequality, which both represent a part of the broader discourse on competition law and sustainability. In fact, if – as we have showed – competition law shall pursue a panoply of goals, and sustainability (or sustainable development) shall be regarded as the higher ensemble in which other sub-goals, like social sustainability, economic sustainability, environmental sustainability, and sustainability of working conditions, are included.

As a confirm of the above, sustainability has been defined by the 1987 World Commission on Environment and Development's Brundtland Report as *development that meets the needs of the present without compromising the ability*

of future generations to meet their own needs.[1160] Moreover, the Report explicitly establishes a link between the two prongs of our work, as discussed above. Indeed, it states that *widespread poverty is no longer inevitable. Poverty is not an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes*.[1161] As evident from the quotation, the Report underlines how sustainable development shall have regard not only to the present dimension, but also to the future. In other words, an economic system oriented only at profits and markups to be earned in the present, without leaving opportunities for the future generations does not match the definition of 'sustainable'. Moreover, an economic system in which poverty (and inequalities) are present, is described as leading to environmental problems, as we are currently experiencing. Consequently, the Brundtland Report tracked the course, by stating that *sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well present needs*.[1162]

As we have anticipated, the need for a change in the current environmental policy is always more pressing, with ever increasing dangerous natural events ringing as alarm bells. In this sense, moves towards more environmentally sustainable policies have been taken. At the United Nations level, on 12 December 2015, 196 States signed the Paris Agreement, which is a legally binding international treaty entered into force on 4 November 2016 and aimed at limiting global warming to 2 or

[1160] World Commission on Environment and Development (chaired by Gro Harlem Brundtland), *Our Common Future*, 1987, 41 (the concept is expressed also at p. 16), available at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (accessed 31 July 2021). See also OECD, *Sustainability and Competition*, 2020, 11, available at https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf (accessed 23 October 2021); M.C. Iacovides and C. Vrettos, *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, cit., 6.

[1161] World Commission on Environment and Development, *Our Common Future*, cit., 16; OECD, *Sustainability and Competition*, cit., 11-12.

[1162] World Commission on Environment and Development, *Our Common Future*, cit., 17.

preferably 1.5 Celsius degree, if compared to pre-industrial levels.[1163] Having regard to the European Union, on 28 October 2019 the Plenary Session of the European Parliament declared climate emergency and urged the Commission to stick to the abovementioned 1.5 Celsius degree target, together with cutting emissions in the EU by 55% within 2030, in order to become climate neutral in 2050.[1164] The Commission took action with the so-called European Green Deal, which confirms the EU's intention to reach a level of zero net emissions of greenhouses gases by 2050. This plan is directed at building a more inclusive economy thanks to this 'green revolution', according to which economic development ought to be separated from the use of natural resources.[1165] In addition, according to the EU's plans, this new economic course could help the Union in achieving a prominent position in what can be regarded as the 'industry of the future'. In fact, at this purpose, one third of the 1.8 trillion euros allocate for the *NextGenerationEU* Recovery Plan will finance the European Green Deal.[1166] Anyhow, the impact of the environmentally sustainable development matched with a competitive advantage thanks to the Green Deal shall then be verified in concrete. Obviously, we hope and believe that this should be the right direction, but all the economic players and Countries ought to 'play the same game', which means that the impact of a zero-emission policy in Europe could be helpful, but not enough for the environment if other Countries keep producing energy through carbon or oil. Moreover, the compliance or not with the sustainability targets might also imply a

[1163] United Nations, *The Paris Agreement. What is the Paris Agreement?*, available at https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (accessed 31 July 2021). The text of the Treaty is available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed 31 July 2021).

[1164] European Parliament, The European Parliament declares climate emergency, 29 October 2019, available at https://www.europarl.europa.eu/news/en/press-room/20191121IPR67110/the-european-parliament-declares-climate-emergency (accessed 31 July 2021). The text of the European Parliament's Plenary Session resolution, P9_TA(2019)0079, European Parliament resolution of 28 November on the 2019 UN Climate Change Conference in Madrid, Spain (COP 25) (2019/2712(RSP)), is available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0079_EN.pdf (accessed 31 July 2021).

[1165] European Commission, *A European Green Deal. Striving to be the first climate-neutral continent*, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (accessed 31 July 2021); European Commission, *Delivering the European Green Deal*, 14 July 2021, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en (accessed 31 July 2021).

[1166] European Commission, *A European Green Deal. Striving to be the first climate-neutral continent*, cit.

disparity of conditions regarding production costs, labour costs and the consequent price paid by consumers, with the advantage of the less sustainable products. Consequently, in order to render this policy and economic shift more likely to be effective, more efforts shall be first made at the international level, so as to bind Countries with the highest polluting rates to respect a sort of international standard. Furthermore, recalling the reflections of the Brundtland Report, income inequalities shall be reduced, also for the purpose of establishing quality (*i.e.*, sustainability) as the main choice parameter for consumers instead of price. Indeed, consumers might be willing to prefer a more sustainable product also if it costs more, but they should afford this possibility. Only with this consideration in mind unsustainable market models can be 'defeated', especially in case an international level-obligation on Countries having an unsustainable economic model would not succeed in being imposed.

In light of the European Green Deal, the question about the possible role that competition law should play in the transition towards a more sustainable economy can receive a positive answer. Moreover, it is worth highlighting that competition law should play its part in this context exactly by reason of the very 'constitutional' basis of the European Union law.[1167]

In general, the already mentioned Article 3, paragraph 3, TEU provides that the 'social market economy' which shall lie at the foundation of the European project aims at *full employment and social progress*, together with *a high level of protection and improvement of the quality of the environment*. This provision enshrines almost all the 'meanings' of the word 'sustainability' that we have mentioned and that are at the foundations of the present work. These rights are also granted by the Charter of Fundamental Rights of the European Union. In fact, the right to social security and social assistance is provided by article 34, as well as article 37 establishes that *a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*. In addition, Article 11

[1167] M.C. Iacovides and C. Vrettos, *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, cit., 9-12.

TFEU reiterates that *environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view of promoting sustainable development*. These provisions confirm how EU's policies, such as competition law, cannot be untied from the Union's 'constitutional' objectives, but they must implement them, also in accordance with the consistency requirement set forth by Article 7 TFEU.[1168]

Under another perspective, having regard to the European Charter of Fundamental Rights, this does not contain any specific provision regarding environmental protection, probably because this issue was not paramount on the policy discourse at the age in which the Charter was drafted. However, this does not imply that the Charter does not require sustainable behaviours towards the environment. In fact, the European Court of Human Rights has adopted an evolutive interpretation of the Charter and, for instance, applied the right to life or family life to environmental issues.[1169] However, as recently pointed out by the Parliamentary Assembly of the Council of Europe, the extensive interpretation of other fundamental rights promoted by the ECHR in order to include environmental protection concerns is only *indirect* and *favours an anthropocentric and utilitarian approach to the environment which prevents natural elements from being afforded any protection per se [emphasis added]*.[1170] At this purpose, the same Parliamentary Assembly recognised that *an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right*.[1171] As a consequence, the Assembly recommended member States of the Council of Europe

[1168] See also S. Kingston, *Why environmental protection goals should play a role in EU competition policy: a legal systematic argument*, in S. Kingston, *Greening EU Competition Law and Policy*, cit. 106-107.
[1169] Council of Europe, *Protecting the Environment using human rights law*, available at https://www.coe.int/en/web/portal/human-rights-environment (accessed 9 August 2021). A summary of the decisions issued by the European Court of Human Rights on environmental issues was made available in July 2021 by the same Court's Press Unit, *Environment and the European Convention on Human Rights*, available at https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (accessed 9 August 2021).
[1170] Parliamentary Assembly of the Council of Europe, *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, Resolution 2396 (2021), 29 September 2021, point 6, available at https://pace.coe.int/pdf/658d3f594762736ba3c0f378798b2c9529cf4be34aa45a8c38616ecd18fa80c0/resolution%202396.pdf (accessed 16 October 2021).
[1171] *Ibidem*, point 9.

to *participate in a political process under Council of Europe auspices aimed at preparing legally binding and enforceable instruments – an additional protocol to the Convention, and an additional protocol to the Charter – in order to protect more effectively the right to a safe, clean, healthy and sustainable environment*.[1172] Finally, it is worth mentioning that at the same Council of Europe's level the Bern Convention on the Conservation of European Wildlife and Natural Habitats was signed in 1979.[1173]

EU member States also recognise environmental protection as a constitutional level right to be protected and the importance of such a right is increasingly highlighted. The major example is represented by the *Charte de l'environnement de 2004*, added in 2005 to the 1958 French Constitution.[1174] It is composed by ten articles. Among them, Article 1 provides that *everyone has the right to live in a balanced environment which shows due respect for health*, whilst Article 2 states that *everyone is under a duty to participate in preserving and enhancing the environment*. Anyhow, for our purposes the most interesting provision is represented by Article 6, which, just as we have seen above, establishes a link between environmental protection, social progress and economic development, as it requires that *public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress*.

The issue of environmental protection was addressed also by Germany, which in 1994 added Article 20a to the *Grundgesetz*. With an interesting reference to the *responsibility towards future generations*, this provision affirms that *the state shall*

[1172] *Ibidem*, point 14.3. An overview of the Council of Europe Parliamentary Assembly's activities aimed at ensuring that the right to a healthy environment is recognised as a basic human right is available at https://pace.coe.int/en/pages/environment-right-now (accessed 16 October 2021).
[1173] Council of Europe, *Convention on the Conservation of European Wildlife and Natural Habitats*, signed in Bern on 19 September 1979, English text available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078aff (accessed 9 August 2021). See also Council of Europe, *Presentation of the Bern Convention*, available at https://www.coe.int/en/web/bern-convention/presentation (accessed 9 August 2021).
[1174] The *Charte de l'environnement de 2004*'s English text is available on the Conseil Constitutionnel's website at https://www.conseil-constitutionnel.fr/en/charter-for-the-environment (accessed 9 August 2021). The *Charte* was added to the French Constitution by means of *Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement*, published in the OJ 2 March 2005.

protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.[1175] In compliance with this provision, in 2019 the Federal Climate Change Act was enacted,[1176] aimed at implementing obligations stemming from the Paris Treaty with regard to the German Republic. However, on 21 March 2021 the German *Bundesverfassungsgericht* intervened with an order that deemed the Act unconstitutional with regard to the provisions governing climate targets and the annual amount of gas emissions allowed until 2030, since they do not specify how emissions would be reduced beyond 2030.[1177] In fact, the Climate Change Act provided for precise emissions reduction targets until 2030, and then referred to an adjustment of the emissions reduction pathway after 2030. Very interestingly, the *Bundesverfassungsgericht* deemed this adjustment mechanism not enough to ensure that the transition to climate neutrality is achieved in time. According to the Court, the emissions reduction obligation stems from the above-analysed Article 20a of the *Grundgesetz* and more detailed gas reduction targets after 2030 are required to protect the freedom guaranteed by fundamental rights, as almost every activity characterising human life imply gas emissions. Therefore, all these freedoms might be threatened by gas reduction obligations in case the climate situation would have reached a tipping point due to excessive emissions allowed in the current phase, thus offloading the burden of fundamental freedoms' limitation to future generations, after 2030. In conclusion, the Court ordered the German legislator to amend the Act with more precise provisions regarding the after-2030 period by 31 December 2022. The Act was amended in June 2021 through the addition of stricter provisions, directed at reaching the climate neutrality target by

[1175] The German *Grundgesetz*'s English text is available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0116 (accessed 9 August 2021).
[1176] Federal Climate Change Act, 12 December 2019, published in OJ I S. 2513. The Act's English translation is available at https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html (accessed 10 August 2021).
[1177] *Bundesverfassungsgericht*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, paras. 1-270, available in English at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html (accessed 10 August 2021). The relevant press release, No. 31/2021, 29 April 2021, *Constitutional complaints against the Federal Climate Change Act partially successful*, is available in English at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html (accessed 10 August 2021).

2045, instead of the previous 2050 deadline. Moreover, the current target of reducing emissions of 55 percent if compared to the 1990 level until 2030 was increased to 65 percent.[1178] In a similar vein, in October 2021 the *Tribunal Administratif de Paris* issued a decision where it stated that the French State must compensate the non-compliance with the carbon emission targets fixed for the 2015-2018 term.[1179] In particular, the Tribunal found that these objectives were exceeded by 15 Mt of carbon dioxide. Therefore, the Court fixed a short term, set on 31 December 2022, within which the French State must compensate this carbon dioxide's excess. Anyhow, this order was not supported by means of *astreinte* measures.[1180]

Having regard to the Italian context, before a constitutional reform intervened in 2022, in absence of specific provisions contained in the Italian Constitution (although it is part of the State's exclusive competences, according to Article 117, paragraph 2, letter s),[1181] the *Corte Costituzionale* – following an approach that reminds those of the European Court of Human Rights – recognised environmental protection as a right to be safeguarded.[1182] In fact, the *Corte Costituzionale* defined the environment as a constitutionally protected value (which, although being part of the State's exclusive competences, according to Article 117, paragraph 2, letter s, does not exclude the possibility of Regions to take measures that might be

[1178] White & Case LLP, *Reshaping Climate Change Law*, 14 July 2021, available at https://www.whitecase.com/publications/alert/reshaping-climate-change-law (accessed 10 August 2021); Dentons, *Parliament passes first law amending the German Federal Climate Protection Act*, 18 June 2021, available at https://www.dentons.com/en/insights/articles/2021/june/18/first-draft-law-amending-the-german-federal-climate-protection-act (accessed 10 August 2021).

[1179] Tribunal Administratif de Paris, decision 14 October 2021, no. 1904967-1904968-1904972-1904976, available (in French) at http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf (accessed 15 October 2021). See the relevant press release by the same Tribunal Administratif de Paris, *L'Affaire du Siècle: l'Etat devra réparer le préjudice écologique dont il est responsable*, 14 October 2021, available at http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-Affaire-du-Siecle-l-Etat-devra-reparer-le-prejudice-ecologique-dont-il-est-responsable (accessed 15 October 2021).

[1180] *Ibidem*.

[1181] The Italian Constitution's English translation is available on the *Senato*'s website, at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed 10 August 2021).

[1182] See the report drafted by the *Corte Costituzionale*'s *Servizio Studi*, *La tutela dell'ambiente, dell'ecosistema e dei beni culturali nei giudizi di legittimità costituzionale in via principale (2002-2015)*, April 2015, available at https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_279.pdf (accessed 10 August 2021).

appropriate in this field,[1183] notwithstanding that the State has the power to establish the relevant 'standards'[1184]). In particular, the Italian Constitutional Court stated that the environment shall be protected as an element that determines the quality of life. Its protection, according to the Court, does not pursue naturalistic goals, but it aims at preserving the environment where humans live, which is necessary for the society. This value should have been protected according to Articles 9 (safeguard of natural landscape) and 32 (right to health) of the Italian Constitution – thanks to an extensive interpretation – and it amounts to an absolute value of primary importance.[1185] However, a proposal of constitution-amending law directed at introducing environmental protection into the Italian Constitution's Articles 9 and 41 (the latter referred to the right to private economic enterprise) was approved in February 2022 – according to the procedure provided for by Article 138 of the Italian Constitution – by both the Camera dei Deputati and the Senato.[1186] This initiative aligns the Italian Constitution with the above-analysed French and German Fundamental Laws, as the amendments explicitly introduce the right to environmental protection. In particular, the reform adds to Article 9 of the Italian Constitution a paragraph which explicitly recognises the protection of the environment, biodiversity and ecosystems, also in the interest of future generations, as a fundamental principle of the Republic. The same Article makes also reference to the protection of animals, although the concrete application of this last provision is delegated to ordinary law.[1187] Likewise, the amended Article 41 of the Italian

[1183] See, *inter alia*, Corte Costituzionale, decision 10 July 2002, no. 407; decision 18 December 2002, no. 536; decision 8 July 2004, no. 259; decision 7 March 2005, no. 108.
[1184] See, *inter alia*, Corte Costituzionale, decision 23 September 2003, no. 307; decision 8 June 2005, no. 232; decision 14 July 2005, no. 336.
[1185] Corte Costituzionale, decision 17 December 1987, no. 641, para 2.2. See also, *inter alia*, Corte Costituzionale, decision 4 July 1989, no. 391; decision 7 March 1990, no. 127; decision 24 September 1990, no. 430.
[1186] Constitutional Law 11 February 2022, no. 1, published in OJ 22 February 2022, no. 44. See Camera dei Deputati, *Tutela ambientale, approvata la proposta di legge costituzionale*, 8 February 2022, available at https://www.camera.it/leg18/1132?shadow_primapagina=13595 (accessed 18 February 2022).
[1187] Camera dei Deputati, *Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente*, 8 February 2022, available at https://temi.camera.it/leg18/temi/modifiche-agli-articoli-9-e-41-della-costituzione-in-materia-di-tutela-dell-ambiente.html (accessed 18 February 2022); Presidenza del Consiglio dei Ministri, Dipartimento per le Riforme Istituzionali, *La riforma costituzionale in materia di tutela dell'ambiente,* available at https://www.riformeistituzionali.gov.it/it/la-riforma-costituzionale-in-materia-di-tutela-dell-ambiente/ (accessed 18 February 2022).

Constitution clearly states that economic activities must not be performed with prejudice to health and the environment.[1188] This step shall be regarded as fundamental in for the Italian system and, in the context of our work, it demonstrates once more how the protection of the environment represents a central topic in the current legal and policy discourse.

In this paragraph we showed that environmental protection amounts to a constitutional-level right or value both if we refer to the European context legislation and in case we take into consideration the legislation of the EU's member States. Accordingly, if policies shall pursue a Nation's or Organisation's constitutional levels, they need to pursue also environmental sustainability. Competition law does not mark an exception to this principle. Consequently, the following paragraph will analyse how competition law provisions – with specific reference to Articles 101 and 102 TFEU – shall be interpreted in order to be compliant to the environmental sustainability 'constitutional clause'. Of course, it is necessary to find the right balance between competition and sustainability without being tricked by 'green washing' strategies aimed at pursuing anticompetitive aims by sustaining alleged (but untrue) environmental sustainability aims.

2. Sustainability and sustainability-enhancing agreements between firms: The role of Article 101 TFEU

Article 101 TFEU represents the most important pitch where competition law may 'green' its enforcement. Indeed, companies willing to introduce more sustainable products or processes may encounter the so-called 'first mover disadvantage', as researching for these innovations is often more expensive than continuing with the conventional ways of running a business.[1189] As a result, a firm that decide to embrace a more sustainable regime may suffer this choice, as it will invest more and it also bears the risk of not recovering these investments, provided that the products offered would probably be – at least initially – more expensive. Given this

[1188] *Ibidem*.
[1189] S. Holmes, *Climate change, sustainability, and competition law*, cit., 14.

premise, companies might be unwilling to launch themselves in sustainability-oriented – but also risky – investments, especially if they are operating in a highly competitive market. Of course, more sustainable products might also come out to be market-breaking ones, but this outcome is not certain when a company starts developing sustainable products. In fact, these items, from the average consumer's point of view, represent a sort of 'dilemma', as they require a difficult trade-off between their price and quality parameters. This is well represented by electric vehicles: Consumers are for sure well-aware of the immense quality improvement brought by electric cars, but not all consumers can afford them or however they want to spend a lot for them. This also raise another important concern about the green transition that competition law may help in addressing: The path towards a more environmentally friendly economy must be sustainable, but also inclusive, meaning that a good equilibrium must be found between quality and price, in order not to leave anyone behind. Competition is crucial for this purpose, as it can establish the right market conditions for developing greener products which, thanks to synergies among regulators and industries, might be also affordable. This would prove fundamental also for reaching the 2050 carbon-free target, which would be an impossible task if the majority of people cannot afford greener products, thus sticking to polluting ones. And this target, of course, cannot be reached by forcing them to buy something that is beyond their possibilities. As a consequence, companies need to cooperate in order to develop more sustainable products, but in doing so they do not have to fear the application of antitrust provisions.[1190] Of course, on the contrary, competition rules cannot be totally relaxed, as this would incentivise 'green washing' behaviours that would negatively affect both competition and the environment.

The existing Treaty provisions and the praxis developed by competition Authorities and Courts already allows the inclusion of sustainability-related issues into the competition law assessment of a case. Four routes appear practicable in this

[1190] *Ibidem*. See also European Commission, *Competition Policy in Support of Europe's Green Ambition*, Competition policy brief 2021-01, September 2021, 1-2, available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF (accessed 15 October 2021).

sense,[1191] which can be categorized into three sub-groups: The first and most important way lies on the exemption provided for by Article 101, paragraph 3, TFEU; The second relies on the standardisation agreements category. Finally, as the final two approaches represent 'alternative' means, they could be analysed together, and they were elaborated upon the 'ancillary restraint' category and the ECJ's *Albany* decision's *dictum*.[1192]

2.1. The Article 101, paragraph 3, TFEU exemption

Article 101 TFEU, paragraph 1, establishes which agreements are contrary to competition rules. The same Article's paragraph 3 set forth that *the provisions of paragraph 1 may, however, be declared inapplicable in case of:*

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

As it is evident, this provision establishes a generally available exemptions from the application of Article 101, paragraph 1, TFEU in case the agreements at stake meet certain conditions. These requirements shall be categorised into positive and negative ones. The latter requires, in a nutshell, that agreements aimed at promoting

[1191] These possibilities are finely addressed and proposed by S. Holmes, *Climate change, sustainability, and competition law*, cit., 15-30: S. Holmes, *Climate change, sustainability and competition law in the UK*, cit., 385.
[1192] European Court of Justice, decision 21 September 1999, Case C-67/96, *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie*.

certain positive improvements do not amount to agreements which detrimentally distort competition, thus, at a certain extent, outweigh the benefits that they may bring. It is also worth pointing out that the no restriction of competition and the proportionality requirement ought to be read as a cumulative condition.

Turning to the positive conditions, the Treaty provision grants the analysed exemption if the concerned agreements are directed at improving goods' production or distribution or they deliver some sort of economic or technical progress. Anyhow, an additional condition applies and requires these agreements to deliver a 'fair share' of these improvements to consumers. In particular, as stressed by the ECJ in *Consten and Grundig*, the benefits brought by the concerned agreement shall *compensate for the disadvantages which they cause in the field of competition*.[1193]

It is worth noticing that the first set of positive requirements is contained in a sentence put together by means of disjunctive conjunctions. Consequently, the exemption is granted also in case the agreement *only* improves the production or the distribution of goods or whether it delivers *only* a technical or economic progress. At this point the first interpretative exercise is needed, and it shall be directed at checking if environmental and – more broadly – sustainability concerns may fit into the first two positive requirements. The answer shall be positive, as practices directed at reducing the production and sale of goods' environmental impact of course improve the production and distribution of goods and they would also introduce more efficient processes which could drastically reduce the waste of natural resources and (limited) rough materials. It is also plain that developing sustainable processes and techniques, thus generally benefiting the environment, would promote technical and economic progress. Therefore, having regard to the first positive requirements needed for Article 101, paragraph 3, TFEU exemption, agreements directed at promoting sustainable development may well match not only one of these disjunctive conditions, but all of them.[1194] Moreover – as it will also be sustained with regard to the ancillary agreement interpretation – it is unlikely that in the current political and policy realm the Commission and Courts

[1193] ECJ, *Consten and Grundig*, cit., page 348.
[1194] Hellenic Competition Commission, *Competition Law and Sustainability*, cit., 27.

will not recognise the positive value brought by practices intended at promoting environmental protection, and, generally, sustainable development. In this sense, the ECJ recognised that the Commission can rely on public policy arguments while evaluating cases under Article 101, paragraph 3, TFEU.[1195] In addition, the Commission has already considered environmental-related justifications to exempt agreements according to the general exemption clause under scrutiny in cases such as *Philips-Osram*,[1196] *CECED*[1197] and *DSD*.[1198]

More challenging, while assessing the merit of a single case, is the second and overarching positive condition, *i.e.*, the delivery of these benefit's fair share to consumers. In fact, it is of course self-evident that, generally, environmentally friendly practices would benefit consumers, but, under a legal perspective, and with the aim (for the sake of legal certainty) of building a regime anchored in predefined concepts, it results essential to better declinate what the required *fair share* is and to what *consumers* it shall be delivered.

According to the Commission Exemption Guidelines of 2004, *the concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1).*[1199] In substance, *the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement*.[1200] Here the Commission also specifies that is not necessary that all the efficiency gains produced by the concerned agreements are passed-on to consumers, but it is required that enough *benefits are passed on to compensate for*

[1195] European Court of Justice, decision 25 October 1977, case C-26/76, *Metro v. Commission*, para 21; EU General Court, decision 11 July 1996, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole television SA et al. v. Commission*, para 118, where the Court stressed that *in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty*. See also Hellenic Competition Commission, *Competition Law and Sustainability*, cit., 26.
[1196] EU Commission, decision 21 December 1994, 94/986/EC, case IV/34.252 – *Philips-Osram*, in particular para 27.
[1197] EU Commission, decision 24 January 1999, 2000/475/EC, case IV.F.1/36.718. *CECED*, in particular paras 55-57.
[1198] EU Commission, decision 17 September 2001, 2001/837/EC, case COMP D3/34493 – *DSD and others*, in particular para 148.
[1199] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, published in OJ 27 April 2004, C 101/97, point 85.
[1200] *Ibidem*.

the negative effects of the restrictive agreement.[1201] However, this does not amount to a full compensation, but to appreciable objective advantages, as it can be read through the lines of the ECJ *Asnef-Equifax*[1202] and *Mastercard*[1203] decisions and sustained also by a recent Ducth ACM's paper on this point.[1204] Moreover, if the agreement leads to an increase in prices, consumers can be compensated *through increased quality or other benefits*.[1205] In fact, in relation to environmental sustainability issues, it is possible that higher prices paid by actual consumers may be reflected in higher long-term benefits to society.[1206]

However, a difficult task appears the evaluation of sustainability gains, as these are not easily measurable through price parameters. In this sense, the Commission Guidelines suggest that when it is difficult to precisely quantify the pass-on to consumers, *undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case*.[1207] Anyhow, as pointed out by the Dutch ACM, *environmental benefits can often be quantified, for example, by indicating the extent to which certain harmful emissions will be reduced, and over what*

[1201] *Ibidem*, point 86.
[1202] European Court of Justice, decision 23 November 2006, case C-238/05, *Asnef-Equifax*, para 72, where the Court stresses that *the overall effect on consumers in the relevant markets must be favourable*.
[1203] European Court of Justice, decision 11 September 2014, case C-382/12 P, *MasterCard Inc. at al. v. Commission*, para 234.
[1204] Dutch Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?*, ACM Legal Memo, 27 September 2021, 1, 3-4, available at https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf (accessed 13 October 2021). See also M. Dolmans, *Sustainable Competition Policy and the "Polluter Pays" Principle*, and M.P. Schinkel and L. Treuren, *Green Antitrust: Friendly Fire in the Fight Against Climate Change*, both in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., respectively 34 and 72.
[1205] *Ibidem*. See also point 102, where it is stated that *consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anticompetitive effects of the agreement, including a price increase*.
[1206] G. Monti and J. Mulder, *Escaping the clutches of EU competition law. Pathways to Assess Private Sustainability Initiatives*, cit., 649; M. Dolmans, *Sustainable Competition Policy and the "Polluter Pays" Principle*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., 31-32.
[1207] Guidelines on the application of Article 81(3) of the Treaty, cit., point 94. See also S. Holmes, *Climate change, sustainability, and competition law*, cit., 26.

period.[1208] This solution appears particularly viable as a means for quantifying an agreement's sustainability gains and comparing them with the related restriction to competition. Moreover, anchoring this process to measurable parameters brings the necessary safeguards for preserving legal certainty in a subject which is correctly guided by broad policy considerations, but which also discounts the risk of excessively enlarging the possibilities of violating competition law. In this sense, pursuing sustainability goals shall be a priority, but legal certainty and preventing green washing initiatives must be the necessary safeguards in the evolutionary process we are describing.

Of paramount importance is also the aspect related to what category of consumers shall receive the fair share required by Article 101, paragraph 3, TFEU. First, the Commission Guidelines specify that *the concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers*.[1209] Moreover, the same guidelines specify that *the decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers*.[1210] In addition, having regard to the time in which consumers shall be benefitted, the Commission precises that *the fact that pass-on to the consumers occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on*.[1211] From this emerges that also future consumers can be considered for the purposes of Article 101, paragraph 3, TFEU, and this is of paramount importance in cases involving environmental sustainability issues.

Having regard to the question about in what market the concerned compensation for a restriction of competition must be evaluated, two opposite interpretations

[1208] Dutch Authority for Consumers & Markets, Draft Guidelines on Sustainability Agreements, 2020, point 32, available at https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf (accessed 16 October 2021).
[1209] Guidelines on the application of Article 81(3) of the Treaty, cit., point 84.
[1210] *Ibidem*, point 87. See also ECJ, *Asnef-Equifax*, cit., para 72.
[1211] *Ibidem*. See also E. Kloosterhuis and M. Mulder, *Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants*, cit., 862.

could face themselves. The restrictive approach should require the fair share to be passed-on to the consumers active in the case's relevant market, whilst a contrary interpretation shall sustain that it is sufficient that society as a whole benefits from this fair share, and, consequently, it should not require that a specific group of consumers (in particular, these impacted by the agreement) are compensated. However – as always – the reason lies in the middle, and a correct interpretation envisages that a group larger than the sole consumers active on the relevant market ought to be compensated, thus requiring a certain link between the benefitted group and the market directly impacted by the agreement at stake.

As a starting argument, point 43 of the Commission Exemption Guidelines states that the assessment of benefits related to Article 101, paragraph 3, TFEU shall be carried out *within the confines of each relevant market to which the agreement relates*.[1212] However, some lines below, it is specified that *where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same*.[1213] On this issue, it is relevant the ruling of the General Court in *Compagnie Générale Maritime*.[1214] Here the Court stated that for the purposes of Article 101, paragraph 3, TFEU, *regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market […], but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement*.[1215] Of course, this broad interpretation was delivered before the publication of the Commission Exemption Guidelines, but it can shed light on an interesting interpretative way – that we would sustain below – aimed at considering more wide-range effects. After the Guidelines' publication, the same General Court in *GlaxoSmithKline* recognised that the compensation required by Article 101, paragraph 3, TFEU can arise also in markets other than the

[1212] *Ibidem*, point 43.
[1213] *Ibidem*.
[1214] EU General Court, decision 28 February 2002, case T-86/95, *Compagnie Générale Maritime v. Commission*.
[1215] *Ibidem*, para 343.

relevant one.[1216] In this case a vertically integrated market was at stake, and the Court considered that the final consumers would have benefitted also of advantages occurring in the upstream market.[1217] However, in the subsequent *Mastercard* judgement (dealing with a credit card system two-sided market), the Court of Justice held that *where […] restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market, in particular […] where the consumers on those markets are not substantially the same*.[1218] Anyhow, some paragraphs below the Court specified that what is required is that both the sides of the concerned market had to receive an advantage, but that has not to be of the same extent.[1219] Consequently, it appears – despite an apparent restrictive interpretation stemming from the fact that if the two groups of consumers are not substantially the same out of markets benefits *in themselves* cannot compensate market disadvantages – that this decision is in line with a less restrictive approach with regard to the what consumers may receive the compensation at stake.[1220] Indeed, as pointed out by the Dutch ACM, the ECJ's *dictum* in *Mastercard* means that *if the two groups were substantially the same, out of market benefits could possibly suffice. This is because fair compensation for consumers can result from out of market benefits for a larger group of beneficiaries that includes the consumers who are also present in the relevant market, for instance because the relevant benefits accrue society as a whole*.[1221] In particular, according

[1216] EU General Court, *GlaxoSmithKline*, cit., para 248. See also Dutch Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?*, cit., 2; G. Monti and J. Mulder, *Escaping the clutches of EU competition law. Pathways to Assess Private Sustainability Initiatives*, cit., 649.
[1217] EU General Court, *GlaxoSmithKline*, cit., para 251.
[1218] EU General Court, decision 11 September 2014, case C-382/12 P, *MasterCard Inc. et al. v. Commission*, para 242.
[1219] *Ibidem*, para 248.
[1220] Hellenic Competition Commission, *Competition Law and Sustainability*, cit., 29; Dutch Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?*, cit., 3.
[1221] Dutch Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?*, cit., 3.

to the ACM, *Mastercard* clarified that *out of market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group* and that *out of market efficiencies benefiting other consumers can also be counted toward a fair share for consumers overall*.[1222] In this sense is worth recalling also the Commission decision in the *CECED* case, where it stated that an agreement aimed at producing more energy-efficient washing machines would create environmental results for society that *would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*.[1223]

To sum up, it appears from the most recent Authorities' positions and from the Commission and European Courts' case law that also benefits arising outside the relevant market shall be considered.[1224] This approach appears commendable, as a too narrow interpretation of the *fair share* requirement would undermine the possibility to exempt agreements that would have a positive effect on the fight against climate changes.[1225] Anyhow, as already anticipated, an excessive enlargement of the requirements could well challenge the legal certainty necessary in the market and the green transition itself, as well.[1226] Consequently, a link between the market affected and the market in which the benefits are passed-on shall be demonstrated and, at this purpose, given the urgency of effective measures to be taken for 'greening' our market, it appears sufficient to require that a simple link or overlap would exist between the group of consumers affected by the agreement and those benefitting from the fair share.[1227]

[1222] *Ibidem*, 4.
[1223] European Commission, *CECED*, cit., point 56.
[1224] See also M. Dolmans, Sustainable Competition Policy and the "Polluter Pays" Principle, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., 31-36.
[1225] T. van Dijk, *A New Approach to Assess Certain Sustainability Agreements under Competition Law*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., 58.
[1226] The risks of an excessive broadening of Article 101, paragraph 3, TFEU's exemption are recognised also by European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 2.
[1227] The 'broader view' suggested by S. Holmes, *Climate change, sustainability, and competition law*, cit., 24.

2.2. Standardisation agreements for sustainable purposes

A second path for allowing firms to pursue environmentally sustainable goals without risking the breach of competition rules relies on the so-called standardisation agreements category.[1228] As defined by the European Commission itself, standardisation agreements *have as their primary objective the definition of technical or quality requirements which current or future products, production processes, services or methods may comply*.[1229] The Commission also plainly specifies that *agreements setting out standards on the environmental performance of products or production processes* are also covered by the rules on standardisation agreements.[1230]

The previous 2001 Commission Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements[1231] contained an entire section dealing with the so-called environmental agreements. They were defined as agreements *by which the parties undertake to achieve pollution abatement […] or environmental objectives*.[1232] The Commission also specified that *environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes*.[1233]

Anyhow, the new Guidelines expressly stated that they do not directly address sustainability agreements – as did in the prior version – and that *standard-setting in the environment sector […] is more appropriately dealt with in the standardisation chapter* of the current Guidelines.[1234] Furthermore, it specified that *in general*,

[1228] However, as pointed out by the OECD, these agreements might also lead to a reduction of competition as a result of the harmonisation of product characteristics. Consequently, a careful competition law assessment, along the lines suggested in paragraph 2.3 of the present chapter, is necessary. See OECD, *Horizontal Agreements in the Environmental Context 2010*, 24 November 2011, 12, available at https://www.oecd.org/competition/cartels/49139867.pdf (accessed 17 October 2021).
[1229] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, published in OJ 14 January 2011, C 11/1, point 257.
[1230] *Ibidem*.
[1231] European Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, published in OJ 6 January 2001, C 3/2.
[1232] *Ibidem*, point 179.
[1233] *Ibidem*, point 180.
[1234] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, footnote no. 14.

depending on the competition issues 'environmental agreements' give rise to, they are to be assesses under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements.[1235] The importance of standards for the promotion of environmental progress is explicitly recognised as an efficiency gain by the Guidelines, as they may facilitate consumer choice and increases product quality.[1236] Moreover, the Commission recognises that standards are an important factor for innovation, as *they can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build up on top of agreed solutions*.[1237] Of course, also standardisation agreements have to respect some basic principles, and first they may not amount to a restriction of competition by object.[1238] Anyhow, as specified by the Commission in its Guidelines, in case a high degree of market power is absent, standardisation agreements do not produce restrictive effects on competition.[1239] However, in case such power exists, some principles are set forth:[1240] First, the participation in standard-setting must be *unrestricted* and the standard-adoption procedure ought to be *transparent*. Moreover, the standardisation agreement must contain *no obligation to comply* with the relevant standard and access to such a standard ought to be provided on *fair, reasonable and non-discriminatory terms*. In case these requirements are met, standardisation agreements *will normally not restrict competition within the meaning of Article 101(1)*.[1241] The Commission Guidance provides also an example of an agreement setting environmental standards, together with the explanation of why this cannot be found in breach of competition rules.[1242] The standardisation agreement route appears practicable also in the U.S. context, as brilliantly outlined by Professor Hovenkamp with regard to an agreement among Ford, Honda, BMW, Volkswagen and the State of California so as to reach higher

[1235] *Ibidem*.
[1236] *Ibidem*, point 308. See also point 263.
[1237] *Ibidem*, point 308.
[1238] *Ibidem*, points 273-276.
[1239] *Ibidem*, point 277.
[1240] *Ibidem*, point 278.
[1241] *Ibidem*, point 280. See also points 281-286.
[1242] *Ibidem*, point 329, example 5.

car emissions standard than those prescribed by the previous Trump Administration.[1243]

The fact that environmentally sustainable purposes can be reached through standardisation agreements has also been confirmed by EU Executive Vice-President Vestager.[1244] In the same speech she also affirmed that in the right cases the Commission is available to provide individual guidance on sustainability-enhancing agreements.[1245] Guidance and direct advice is what firms really need in the current scenario, as they might be willing to introduce 'green' innovations, but they fear the application of competition rules, given that all that we outlined in the present chapter is an interpretation of the current praxis, but it shall however be assessed in every single case. Therefore, an additional and more plain guidance is particularly needed to really change the pace in the path towards a greener economy. The Commission itself affirmed that *concrete examples illustrating how sustainability objectives can be pursued safely by different types of cooperation agreements […] could give reassurance to businesses and unlock investments*.[1246] In this sense, the Commission also stressed that in case it is required by the public interest, it could also issue a 'finding of inapplicability' pursuant to Article 10 of Regulation 1/2003,[1247] which provides that in case the public interest relating to the application of Articles 101 and 102 TFEU so requires, *the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty [101 TFEU] is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied*.

An example of a clearer regime for promoting sustainability initiatives will be introduced in the agricultural sector (which should play a prominent role in the green transition), through the new Common Agricultural Policy (CAP) for the

[1243] H. Hovenkamp, *Are Agreements to Address Climate Change Anticompetitive?*, 2019, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3451931_code23858.pdf?abstractid=3451931&mirid=1 (accessed 17 October 2021); see also S. Holmes, *Climate change, sustainability, and competition law*, cit., 30.
[1244] M. Vestager, *Competition policy in support of the Green Deal*, cit.
[1245] *Ibidem*.
[1246] European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 5.
[1247] *Ibidem*, 6.

period 2023-2027, on which a provisional political agreement was reached by the Council and the European Parliament in June 2021.[1248] In particular, an exemption from the application of Article 101 TFEU will be granted to sustainability agreements entered into by producers and other actors active in the food value chain and aimed at achieving higher standards than those required by the law with regard to environmental protection, climate change prevention, animal health and animal welfare.[1249] Of course, the eventual restriction of competition must be proportionate.[1250] The Commission announced that it will issue guidelines about the application of this exemption by the beginning of 2024.[1251]

2.3. Alternative routes for exempting sustainable agreements from the application of Article 101 TFEU

The two final routes are a sort of praetorial interpretation of competition provisions along more environmental or sustainability-sensitive lines. The first approach envisages a policy which confers competition Authorities and Courts with the possibility of adopting – at a certain extent – a sort of 'multi-value' approach while interpreting competition provisions. The case that acts as cornerstone for such possibility is the ECJ's *Albany* decision. In this ruling the ECJ had to decide whether collective bargaining agreements in the labour field fell under the scope of Article 101 TFEU. Of course, from a pure 'classical' economic point of view there are no reasons why these agreements shall escape the application of competition provisions. However, fortunately, our societies' 'constitutional' norms inform our legislations to take into consideration the practical circumstances of certain situations, and not only their abstract economic significance. In this sense, labour law represents indeed a very broad *corpus* of provisions aimed at improving the general working conditions, also by means of collective agreements between the

[1248] European Commission, *A Greener and Fairer Cap*, 2021, 2, available at https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/factsheet-newcap-environment-fairness_en.pdf (accessed 17 October 2021).
[1249] *Ibidem*, 9; see also European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 6.
[1250] European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 6.
[1251] *Ibidem*.

parties involved. In the analysed case, the Court of Justice, after reminding that the EU Treaties indicate social protection as an objective to be pursued by the Union, stressed that *certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreement would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking to jointly adopt measures to improve conditions of work and employment*.[1252] Having regard to its scope, the agreement concerned represented the outcome of negotiations between employers and workers and established a supplementary pension scheme managed by a pension fund to which affiliation might have been compulsory. However, as the Court pointed out, this agreement was aimed to *guarantee a certain level of pension for all workers in that sector*, thus improving their working condition.[1253] As a condition, according to the Court, such an agreement fall outside the scope of Article 101 TFEU.[1254]

This approach, which, more recently, was confirmed by the ECJ also in the *FNV Kunsten* ruling,[1255] clearly introduced a policy element into the ECJ's reasoning and this was plainly supported by the EU Treaties. Therefore, given the above analysed Treaties provisions aimed at reaching a high level of environmental protection, together with the consistent policy lines endorsed by the Commission with the Green Deal and the signing of the Paris agreement, there are no obstacles for exempting – of course, after a careful analysis – agreements directed at pursuing environmental-friendly goals from the scope of Article 101 TFEU.[1256] Curiously, this interpretation, which weight other 'social' aims into the competition law assessment of a case is close to the one advanced by Louis Brandeis while delivering the opinion of the Court in the 1918 *Chicago Board of Trade* case

[1252] *Ibidem*, para 59.
[1253] *Ibidem*, para 63.
[1254] *Ibidem*, para 64.
[1255] European Court of Justice, decision 4 December 2014, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*. See S. Holmes, *Climate change, sustainability, and competition law*, cit., 17, footnote no. 36.
[1256] M. Dolmans, *Sustainable Competition Policy and the "Polluter Pays" Principle*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), Competition Law, *Climate Change & Environmental Sustainability*, cit., 29.

(analysed in chapter 3).[1257] There, the agreement was not deemed anticompetitive as it was in favour of small wheat producers against the market power held by the big acquiring firms. Thus, this line of reasoning can be applied for exempting environmentally oriented agreements from the application of antitrust provisions also in the United States.

An alternative way for assessing sustainability clauses in the competition law realm is that of evaluating them as 'ancillary restraints'. These are defined by the Commission itself as *restrictions […] which do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by agreement*.[1258] Anyhow, as pointed out by Professor Holmes, although this route has not been tested in Court yet, there are no reasons why it should not be followed.[1259] In fact, as explained by the same Author, the environmental topic is currently seen as a policy priority, thus hardly ever a Court would not accept such a justification in case it is contained in an ancillary agreement.[1260] In practice, companies may rely on this possibility as *another* possible way for having an agreement exempted from the application of Article 101 TFEU, maybe as a subordinate motive if discussed in a case.

However, although the positive aspects of the above reported interpretations, they do not appear sufficiently convincing for sustaining the necessary shift towards a European market where sustainable products and production methods are the new standard, rather than merely a 'niche' alternative. Indeed, these two parallel routes relies on a case-by-case assessment of each single agreement's merits, and they may well function with reference to single cases, also in a large number of them. Anyhow, they do not establish a sort of 'level playing field', a complete and objective guide, on which firms may firmly rely while running their business.

[1257] 246 U.S. 231 (1918).
[1258] European Commission, *Glossary of terms used in EU competition policy*, 2002, available at https://op.europa.eu/it/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6 (accessed 15 October 2021). Please note that although this publication has been archived, it proves still helpful for defining key competition law terms.
[1259] S. Holmes, *Climate change, sustainability, and competition law*, cit., 18; E. van den Brink and J. Ellison, *Article 101(3) TFEU: the Roadmap for Sustainable Cooperation*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), Competition Law, Climate Change & Environmental Sustainability, cit., 42.
[1260] S. Holmes, *Climate change, sustainability, and competition law*, cit., 18.

Therefore, these two routes may reinforce the arguments in favour of an agreement needed for sustainability purposes, or they might be used in particular cases, but a complete shift would not occur if firms may however incur in the risk of having Article 101 TFEU applied to 'green' agreements. Consequently, to achieve the necessary degree of legal certainty so as to establish a proper market where firms can compete also in order to deliver 'greener' products, other paths have to be followed, such as the analysed Article 101, paragraph 3, TFEU exemption and the standardisation agreements option.

3. Is Article 102 TFEU capable of contributing to sustainability-oriented objectives?

Although Article 101 TFEU appears to be the main instrument for adding a 'sustainable suit' to competition law, also Article 102 TFEU has a role to play in this scenario.[1261] This represents a possibility of paramount importance, as market power – that we included into the causes of growing inequalities back in chapter 2 – might have a negative impact on sustainability.[1262] In fact, as already showed, the high market power of dominant companies might well translate into political power and, especially in the past, it might have blocked or slowed down the adoption of more environmental-friendly regulatory boundaries.[1263] Anyhow, the time of 'capture' appears now relegated to the past, given that the need for sustainable behaviours is increasingly stressed by Governments and Regulators. However, this do not address the fact that very large and powerful companies' production processes have a great impact on the environment. Indeed, a 2017 report quoted by

[1261] Indeed, as suggested by Iacovides and Vrettos, the role of Article 102 TFEU in 'greening' competition law has not properly been analysed yet. See M.C. Iacovides and C. Vrettos, *Radical for Whom? Unsustainable Business Practices as Abuses of Dominance*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., 93.
[1262] M.C. Iacovides and C. Vrettos, *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, cit., 14-15.
[1263] M.C. Iacovides and C. Vrettos, *Radical for Whom? Unsustainable Business Practices as Abuses of Dominance*, cit., 94-95.

Iacovides and Vrettos showed that just 100 companies are responsible of over 70% of greenhouse gas emissions in the 1988-2015 time frame.[1264]

As suggested by Professor Holmes, Article 102 TFEU can be used both as a 'sword', to punish unsustainable behaviours, and as a 'shield' aimed at exempting from its application sustainability-oriented practices.[1265] Having regard to the latter possibility, dominant firms may well engage in a behaviour which could apparently lead to a violation of competition law, but it is also justified from a sustainability standpoint. In this case, an 'objective economic justification' or an 'efficiency' can be invoked for escaping the application of Article 102 TFEU.[1266] In particular, efficiencies stemming from the concerned practice must outweigh the relevant competition foreclosure. In this direction, the Commission Guidelines on the application of Article 102 TFEU[1267] provides that *a dominant undertaking may also justify conduct leading to foreclosure of competition on the ground that efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise*.[1268] However, this is subject, to four cumulative conditions, which require that:

- the efficiencies at stake stem from the conduct;
- the conduct is indispensable in order to realise these efficiencies, *i.e.*, other less anti-competitive conducts cannot lead to the same efficiencies;
- these efficiencies have to outweigh the negative effects on competition and consumer welfare in the affected market;
- effective competition is not eliminated by the conduct under scrutiny.[1269]

[1264] *Ibidem*, 92. See P. Griffin, *The Carbon Majors Database. CDP Carbon Majors Report 2017*, July 2017, Appendix 1, 14, available at https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772 (accessed 21 October 2021). Tellingly, the report shows also that more than 50% of greenhouse gas emissions from 1988 to 2015 can be attributed to only 25 corporate or state producers.

[1265] S. Holmes, *Climate change, sustainability, and competition law*, cit., 30-36; S. Holmes, *Climate change, sustainability and competition law in the UK*, cit., 385-386.

[1266] Hellenic Competition Commission, *Competition Law and Sustainability*, cit., 34. C. Thomas, *Exploring the Sustainability of Article 102*, in S. Holmes, D. Middelschulte, M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, cit., 111-112.

[1267] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, published in OJ 24 February 2009, C 45/7.

[1268] *Ibidem*, point 30.

[1269] *Ibidem*.

From a procedural standpoint, the firm asking for the exemption bears the burden of demonstrating that the conduct at stake is capable of being justified.[1270] Of course, in the context we are analysing, the 'objective justification' directed at avoiding the application of Article 102 TFEU shall involve efficiencies related to environmental sustainability, which can also outweigh practices otherwise abusive such as an increase in price (although, as anticipated, we sustain that this increase ought to remain 'fair', thus not leading to the exclusion of the less affluent consumers from the possibility of enjoying greener products, as the green transition may well occur when sustainable items would be available for every consumer) or practicing 'green predatory pricing' in order to launch new environmentally-friendly products.[1271] Of course, the objective justification's requirements shall be applied rigorously in order not to incentivise green washing practices.

The other face of Article 102 TFEU's medal is its use as a weapon for the promotion of sustainable goals. This should rely primarily on policy considerations that the Commission can consider while selecting the cases to pursue. In the context of inequalities, Baker and Salop suggested that competition Authorities could give priority to cases benefitting disadvantaged people.[1272] Consequently, in a similar – but also opposite – vein, the same can be made with environmental considerations and Authorities could instead prioritise cases related to environmental-impacting behaviours. Another policy option can be the application of higher fines in case an anticompetitive conduct undermines the Union's environmental objectives.[1273] This, of course, can occur while enforcing both Articles 101 and 102 TFEU.

In the sustainability realm, certain practices may be regarded as abusive if companies undertake unsustainable behaviours through their market power's abuse. This broader interpretation is possible because Article 102 TFEU envisages an 'open clause' of possible abuses.[1274] In this sense, Article 102 TFEU may be

[1270] *Ibidem*, point 31.
[1271] S. Holmes, *Climate change, sustainability, and competition law*, cit., 35.
[1272] J.B. Baker and S.C. Salop, *Antitrust, Competition Policy, and Inequality*, cit., 19-20.
[1273] Although with regard to Article 101 TFEU, G. Monti, *Four Options for a Greener Competition Law*, cit., 127.
[1274] European Court of Justice, *Continental Can*, cit., para 26; decision 14 November 1996, case C-333/94 P, *Tetra Pak International SA v. Commission*, para 37; *British Airways*, cit., para 57; EU General Court, decision 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission*, para

applied, for instance, in cases where a firm impose *unfair trading conditions* which encompasses the economic realm and are unfair also from a sustainability perspective, being it related to social or environmental conditions.[1275] An example of this may be represented by practices carried out in the agricultural sector by dominant companies, which harm small farmers. This could have both social and environmental implications, as small farmers could not have a fair share of their products' value and, furthermore, they would be prevented from investing in more sustainable production techniques or processes. In fact, if we want to switch towards a sustainable economy, it is crucial that the value of the overall supply chain shall be fairly distributed among the economic actors involved. In this sense, not only the final price, but also other factors come into play. Having regard to the agricultural sector, it is interesting to note that the European Parliament's Committee on Economic and Monetary Affairs sustained that *a 'fair price' should not be regarded as the lowest price possible for the consumer, but instead must be reasonable and allow for the fair remuneration of all parties along the food supply chain*, as *consumers have interests other than low prices alone including animal welfare, environmental sustainability, rural development* etc.[1276] The Parliamentary Committee thus encouraged *Member States' competition authorities to take account of consumer demand for sustainable food production, which requires that greater account be taken of the value of 'public goods' in food pricing*.[1277] Then, it concluded that prices in contracts between retailers and producers should at least cover costs.[1278] This is also in line with Article 39 TFEU[1279] and it is in part implemented by the recent Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.[1280]

860. See M.C. Iacovides and C. Vrettos, *Radical for Whom? Unsustainable Business Practices as Abuses of Dominance*, cit., 97; R. Whish and D. Bailey, *Competition Law*, cit., 198.

[1275] S. Holmes, *Climate change, sustainability, and competition law*, cit., 31.

[1276] European Parliament, Committee on Economic and Monetary Affairs, Annual Report on Competition Policy 2018, 18 December 2018, point 78, available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0474_EN.html (accessed 17 October 2021).

[1277] *Ibidem*.

[1278] *Ibidem*.

[1279] S. Holmes, *Climate change, sustainability, and competition law*, cit., 32.

[1280] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, published in OJ 25 April 2019, L 111/59. For a comment on this Directive see F. Cafaggi and P. Iamiceli, *Unfair Trading Practices in Food Supply Chains. Regulatory Responses and*

Consequently, in order to succeed in reaching a higher degree of sustainability in the internal market, both from a social and an environmental perspective (which, in this case, are interrelated), also Article 102 TFEU shall play its part. For this purpose, competition Authorities ought to take into consideration aspects beyond mere price-related and econometric issues.

4. Initiatives put in place by Competition Authorities for the promotion of sustainability

In the final part of this chapter, it is worth recognising that the mentioned 'green revolution' of the European economy cannot be reached if proposals directed at establishing a 'greener competition law' remain in academic books and articles. Competition Authorities must take the initiative and active enforcement steps in the environmental field, in line with our analysis on how Articles 101 and 102 TFEU may help in pursuing sustainable goals. Anyhow, the most important action in this sense is that of providing better guidance on how firms may behave so as to promote sustainability-oriented business initiatives.

In this sense, we have already pointed out the availability of the Commission to issue individual guidance letters on sustainability initiatives. Furthermore, we believe that an updated version of the Article 101 and 102 TFEU Guidelines could be issued for the purpose of integrating sustainability-related aspects. This initiative would therefore confer more legal certainty to the possibilities envisaged in this chapter and could well incentivise European firms' sustainable initiatives. In this sense, the Dutch Authority for Consumers & Markets issued back in 2014 a 'vision document' on competition and sustainability.[1281] In 2020 it published draft guidelines on sustainability agreements[1282], whilst in 2021 a clarification about the

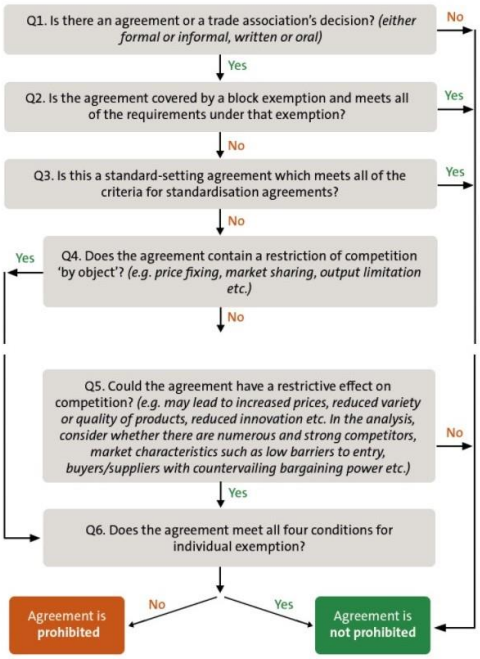
Institutional Alternatives in the Light of the New EU Directive, European Review of Private Law, 2019, 5, 1075.

[1281] Dutch Authority for Consumers & Markets, *Vision Document on Competition & Sustainability*, 9 May 2014, available at https://www.acm.nl/sites/default/files/old_publication/publicaties/13077_vision-document-competition-and-sustainability-2014-05-09.pdf (accessed 17 October 2021).

[1282] Dutch Authority for Consumers & Markets, Draft Guidelines on Sustainability Agreements, cit.

notion of 'fair share' for consumers was released.[1283] These documents are of particular importance, as they will provide firms with an inside of how competition Authorities will interpret certain concepts and issues related to sustainability-enhancing agreements. The Hellenic Competition Commission, as well, after an outstanding conference about competition law and sustainability held in September 2020, issued a very complete staff discussion paper on this matter.[1284] Moreover, the same Greek Authority and the Dutch ACM commissioned a technical report on sustainability and competition law published in January 2021.[1285] In a similar vein, the German Bundeskartellamt drafted a working paper on *Sustainability and Competition* for the 2020 OECD Competition Committee meeting.[1286] Finally, the UK Competition & Markets Authority, after having affirmed that a focus for the 2021/2022 term will be placed on *supporting the transition to a low carbon economy*,[1287] issued a guidance where the CMA's approach to sustainability agreements is delineated and useful guidelines for businesses are provided.[1288] In particular, the CMA's guidance contains the following chart, which represents a very useful tool for firms that shall be implemented by more competition Authorities:[1289]

[1283] Dutch Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?*, cit.
[1284] Hellenic Competition Commission, *Competition Law and Sustainability*, cit.
[1285] R. Inderst, E. Sartzetakis, A. Xepapadeas, *Technical Report on Sustainability and Competition*, report commissioned by the Dutch ACM and the Greek HCC, January 2021, available at https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/2165_f998b905c20c0426f068e512186c6ec4.html (accessed 17 October 2021).
[1286] Bundeskartellamt, *Sustainability and Competition – Note by Germany*, 27 November 2020, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Sustainability_and_Competition.pdf?__blob=publicationFile&v=2 (accessed 22 October 2021).
[1287] *CMA consults on Annual Plan 2021/2022*, 3 December 2020, available at https://www.gov.uk/government/news/cma-consults-on-annual-plan-2021-22 (accessed 17 October 2021).
[1288] Competition & Markets Authority, *Guidance on Environmental sustainability agreements and competition law*, 27 January 2021, available at https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law (accessed 17 October 2021).
[1289] *Ibidem*.



Another option, also suggested by the European Commission, is the adoption of a so-called 'regulatory sandbox',[1290] which consists in a structured context where innovative technologies, solutions or approaches can be tested for a limited time under the supervision of a regulatory authority that ensures that the necessary safeguards are in place.[1291] In this sense, the Hellenic Competition Commission chaired by Professor Ioannis Lianos was again at the forefront and on 12 July 2021 launched a public consultation – concluded on 20 August 2021 – regarding the proposal for the creation of a sandbox for sustainability and competition in the Greek market.[1292] The sandbox solution shall be regarded as a particularly

[1290] European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 3.
[1291] See the definition provided by the Council of the EU, *Regulatory sandboxes and experimentation clauses as tools for better regulation: Council adopts conclusions*, 16 November 2020, available at https://www.consilium.europa.eu/en/press/press-releases/2020/11/16/regulatory-sandboxes-and-experimentation-clauses-as-tools-for-better-regulation-council-adopts-conclusions/ (accessed 17 October 2021). See also the definition provided by European Commission, Competition Policy in Support of Europe's Green Ambition, cit., 3, footnote no. 7.
[1292] Hellenic Competition Commission, *Public consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek market*, available at https://www.epant.gr/en/enimerosi/sandbox.html#diavoulefsi (accessed 17 October 2021); see also the relevant press release, 13 July 2021, available at https://www.epant.gr/en/enimerosi/press-releases/item/1471-press-release-public-consultation-proposal-for-the-creation-of-a-sandbox-for-sustainability-and-competition.html (accessed 17 October 2021).

ambitious and functioning one, as it allows competition Authorities to explore the 'new' frontier of competition law and sustainability in a safeguarded – but also appropriate for the development of innovative solutions – environment.

5. Conclusion

In this chapter we affirmed that competition ought to play a role in the transition towards a greener economy, being it required by the 'constitutional' provisions contained in the EU Treaties. However, while analysing the various possibilities for implementing sustainability-related concerns through the current competition provisions, a tension between the 'social' and the 'economic' soul of competition law emerged. This does not happen by chance, as this clash, back in 2015, led to the contradictory assessment issued by the Dutch ACM – one of the most progressive competition Authorities about sustainability issues – in the *Chicken of Tomorrow* case.[1293] The issue involved an initiative put forward by supermarkets and firms active in the poultry market to set a minimum standard related to the chickens' 'animal welfare'. This agreement would have led to the replacement of the 'ordinary' chickens with the so-called 'Chicken of Tomorrow'. Anyhow, after having carried out a willingness to pay analysis, the ACM established that the consumers' willingness to pay was not enough to justify the increase in chickens' prices that the arrangement at stake would have caused. Consequently, the ACM held that the positive aspects of the 'Chicken of Tomorrow' initiative did not outweigh the reduction in consumer choice (as consumers would not have the possibility to buy 'ordinary' chickens anymore) and the related increase in prices.[1294] In addition, the ACM stressed that instead of setting a minimum standard, consumers should have been informed more properly about the chickens' welfare

[1293] Dutch Authority for Consumers & Markets, *ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'*, 26 January 2015, case ACM/DM/2014/206028, available at https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf (accessed 17 October 2021). See also I. Lianos, *Polycentric Competition Law*, cit., 26-28; G. Monti and J. Mulder, *Escaping the clutches of EU competition law. Pathways to Assess Private Sustainability Initiatives*, cit., 639-641.

[1294] Dutch Authority for Consumers & Markets, *ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'*, cit., 6.

by means of appropriate labelling, a measure which is regarded as less restrictive of competition.[1295] As anticipated, this case plainly shows the tension between the price-centric dimension of competition law and its 'multi-value' one. What is clear is that in order to make a fruitful step towards a more sustainable approach to competition law, aspects not related with price shall be attributed much more importance in the competitive assessment of the single cases. In doing so, as we have outlined, guidance for firms is necessary, as only if some degree of legal certainty is met firms would be willing to heavily invest in greener and more sustainable products and processes without the fear of breaching competition provisions. In this sense, a twofold approach is needed. From the 'informative' side, issuing progressively more detailed guidelines – as done by the UK CMA, the Dutch ACM and the Greek HCC – represents the best solutions. In addition, on the 'operative' side, increasingly refined solutions ought to be elaborated and this should occur through experimentation in a 'safeguarded' environment, as those provided by regulatory sandboxes.

However, at the basis of all this shall lie the paramount belief that competition law is included into a broader policy environment and that, as pointed out by the European Commission itself, the consumer welfare standard (European version) *pertains not only to price reduction, but also to quality and innovation*.[1296] Of course, we cannot deny that environmental concerns should pertain to the quality assessment in competition law cases.

The necessity to make steps towards a more environmentally sustainable approach to competition law is evident also if we think at the ongoing climate emergency: In the words of Professor Holmes, w*e face a 'climate emergency' in which 'business as usual' is not an option and in which a rapid move to more sustainable development is vital*.[1297] *Just because competition cannot do everything, it does not mean that it cannot do anything*.[1298]

[1295] *Ibidem*, 7.
[1296] European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 5-6.
[1297] S. Holmes, *Climate change, sustainability, and competition law*, cit., 1.
[1298] *Ibidem*, 2.

7

Conclusion

[…] And you can't have a competition policy that is ready for the future, unless it can tackle the threats to competition that come from digitisation. […] We need to address the power of digital platforms. […] It's also that the huge amount of data that some platforms have, and the huge networks behind them, can give them an edge that smaller rivals can't match. […] We need to preserve the opportunity for smaller rivals to break into the market, by offering something different, which dominant platforms don't have.[1299]

The following lines are aimed at drawing the conclusions of the present research. Our 'journey' started with the question *whether* competition law shall play a role in a transition towards a more sustainable and equitable economy and, in case of positive answer, *how* this task should be performed.

What we found through the whole course of this research is that competition law, as commonly intended during the last decades, so as a self-standing subject, aimed only at increasing the efficiency of the market (at a certain extent more through total

[1299] European Commission's Executive Vice-President Margrethe Vestager, *Competition and the digital economy*, speech delivered at the OECD/G7 Conference, Paris, 3 June 2019, available at https://wayback.archive-it.org/12090/20191129200956/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en (accessed 3 February 2021).

welfare lines) is not compliant with the very foundations of our constitutional heritage and, moreover, it is not ready for the main challenges that our societies are currently facing, which are inequalities, climate changes, and digitalisation. What we have to acknowledge is also that all these challenges are interlinked, and, consequently, they need an integrated response. For all these reasons we sustain that competition law cannot anymore be interpreted along pure econometric and efficiency lines, but it needs to be grounded on a *multi-value* approach, which accounts for the policy aims that guided the introduction of competition law. In this sense, the same European Commission declared that *competition authorities do not operate in a political vacuum*.[1300] Moreover, the European Parliament recently stressed that *abuse of market power and related unjust behaviour, such as degradation in quality or extortive practices, can take place even when products or services are supplied for free; stresses that EU consumers' interest go beyond low prices and, in line with the principles of the TFEU, also include quality, innovation, productivity, sustainability, environmental protection and the proliferation of fair trading relations; considers that competition policy should better integrate the value of public goods and externalities associated with certain types of production*.[1301] This should confirm that a renewed approach to competition law, along more holistic lines, appears particularly needed. In detail, this proves that issues such as inequalities and sustainability *are* part of competition law concerns. Of course, as we have already underlined, competition law cannot solve all these issues alone, it is not the cure for every disease. However, it shall play *its* role in a broader policy agenda composed also by other tools (*multi-tool* approach). In a nutshell, using a metaphor, competition law is a player of a team composed by all the policies that compose our systems and together they need to win the match against the issues that we have analysed in the course of this book.

After this research's conclusive remarks, we deem appropriate reaching the concluding reasoning of this work with a quotation by Luigi Einaudi, former

[1300] European Commission, *Competition Policy in Support of Europe's Green Ambition*, cit., 2.
[1301] European Parliament, Committee on Economic and Monetary Affairs, Annual Report on Competition Policy 2020, 18 May 2021, point 72, available at https://www.europarl.europa.eu/doceo/document/A-9-2021-0168_EN.html (accessed 17 October 2021).

President of the Italian Republic, dean and professor at the University of Turin and also Chair of the Bank of Italy. In his 1942 work *Economia di concorrenza e capitalismo storico. La terza via fra i secoli XVIII e XIX*, published in English as *Economy of Competition and Historical Capitalism. The Third Way Between the 18th and the 19th Centuries*,[1302] Einaudi, while reviewing Wilhelm Röpke's *The Social Crisis of Our Time*,[1303] reasoned about the essence of the economy governed by competition and the economic system, referred to as historical capitalism, concretely applied since the XIX Century. Among his very inspiring reflections in this article, Einaudi wrote:

All we want to say instead is that the economists, accustomed to state their case clearly, should also note that in certain moments of their life, perhaps in the most important moments, men decide not to rationalise about the acquisition of wealth, that they prefer little to much, that they attribute the connotation of 'good' to entities outside the material world, that they become tired of calculating and put limits to their 'economic conduct', beyond which non one can pass without human society becoming dissolved.[1304]

[…] The true criticisms are other ones, and they are not directed against the economic system which is erected on the competition of market. The system, the fruit of the currents of ideas peculiar to the eighteenth century, explained in the pages of the physiocrats and of Adam Smith, influenced in part, by its survival, the nineteenth century; […]. But next to it, during the nineteenth century, rose and flourished another kind of economic system. One could also call this system liberal, and most people would call it capitalistic; but Röpke prefers to call it 'liberalism or historical capitalism', in order to draw attention to the fact that one thing is the

[1302] L. Einaudi, *Economia di concorrenza e capitalismo storico. La terza via fra i secoli XVIII e XIX*, *Rivista di storia economica*, 1942, 49-72, available at https://www.luigieinaudi.it/doc/economia-di-concorrenza-e-capitalismo-storico-la-terza-via-fra-i-secoli-xviii-e-xix1/ (accessed 3 December 2021) and published also in L. Einaudi (edited by A. Giordano), *Il paradosso della concorrenza*, Rubbettino, 2014, 55-100. The article was published in English as *Economy of Competition and Historical Capitalism. The Third Way Between the 18th and the 19th Centuries*, Scienza Nuova, 1954, 1, 1, 1.

[1303] W. Röpke, *Die Gesellschaftskrisis der Gegenwart*, Eugen Rentsch Verlag, 1942, published in English as *The Social Crisis of Our Time*, Chicago University Press, 1950, and available in Italian as *La crisi sociale del nostro tempo*, Einaudi, 1946.

[1304] L. Einaudi, *Economy of Competition and Historical Capitalism. The Third Way Between the 18th and the 19th Centuries*, cit., 3.

economic system theorized by the great writers of the eighteenth century, and which them and later achieved fruitful materialisation; and another thing is the system, practically realised during the nineteenth century (1840-1940), under the influence of the ideas proper to this same nineteenth century and under the influence of the achievement of concrete interests, which dominated at this time. This is 'a given type of liberalism' and 'a given type of capitalism' which found its realisation in the century 1840-1940, and which we therefore call 'historical'. […] Historical capitalism was thus born corrupted; the elephantiasis of great cities, of great enterprises, and of industrial, monopolistic cartels was not created by chance or by technics, but by the history and by the structure of the pre-existing feudal society, which was perpetuated by legal men and by ill-counselled legislators. Historical capitalism is not founded on a natural order of things, but in institutions created by men […]. If it is necessary to make the competitors' starting-point as little unequal as possible – an absolute equality cannot be thought of because of the diversity which is peculiar to man – one should create around the economy of competition a legal order which is more suitable to it […]. [L]egislation can make war ono monopoly, entrusting to the authorities concerned the task of ordering and assuring their abolition (Sherman Act of 1890). What monopolistic feature remain in the economic structure will be of such small importance as not to disturb the framework of the system of competition in which only enterprises are successful is as far as they manage to satisfy the needs of the consumers at the marginal costs.[1305]

[…] The great culprit is not the economy of competition, but the non-observance of the rules of the game of competition on the part of capitalism or historical liberalism in the nineteenth century. Men of the past century assumed that it would be enough to let the opposed interests interact so that the common good might rise from their contrast. No, this is not enough. If you give free play to the laissez-faire, laissez-passer attitude there will prevail the agreements and the machinations of the few against the many, of the rich against the poor, of the strong against the weak, of the clever men against innocent people. But this, a constructive criticism of historical liberalism, only imposes on us a return to the pure origins of the system

[1305] *Ibidem*, 15-17.

of competition. this implies just as much, or perhaps more, intervention than any other economic system, an intervention destined to preserve the action of competition intact, which is the only true force enabling the observance of the common interest to flourish from this contrast of interests. The legislator must intervene in order to level daily the trenches behind which groups of producers are barricading themselves so as to acquire privileges which are dangerous for other producers and for consumers. The legal norms which to-day favour or tolerate silent or evident agreements that are made in order to drive up prices, profits and incomes, should be substituted by others which forbid these agreements or make them impossible. And the observance of the new law should be entrusted to independent and inflexible authorities, put beyond any possibility of caprice or of favour. The plant of competition does not rise and grow by itself; it is not a century old tree, which a furious tempest cannot overthrow, but a little, delicate plant which must be lovingly defended against the maladies of egoism and of particular interests and which must be carefully guarded against the dangers that threaten it from every corner of the economic firmament.[1306]

[…] It was a catastrophic error to consider the economy of the market or of competition as something autonomous, centred in itself, or as a natural condition growing outside the national sphere, and needing no help in supporting and defending itself. For this meant neglecting the decisive importance of an ethico-legal-institutional 'atmosphere' fitted to the principles of this same economy. […] The original sin of the theoreticians of the economy of competition can be defined as ratiocination driven too far. Whoever persuades himself, as he should persuade himself if he thinks rightly, that competition is sufficient to guarantee the best services at the relatively lowest cost – if such competition is truly put into action and daily defended against the deformations that come from disequality at the starting-point and against the supremacy of special group-interests, which are deeply entrenched against the common interest in monopolistic situations – such a man is bound to fall into the fallacious illusion that men are wrong if they are not satisfied to live in such a perfect system. The purely rationalising economist asks

[1306] *Ibidem*, 19.

himself stupefied: Why should men not be content? Does not universal competition secure success for the best and a life for all, according to their individual merits; does it not perhaps keep the producers permanently on the alert and does it not prevent them from resting on their laurels? Every day and every hour the producers of goods and of services have to appeal to the vote, to the dominus of the market, the consumer; and only if they manage to satisfy the desires of a sufficient number of them have they a cause for living and prospering. Men who are incapable or negligent seek refuge in public charity, but he who possess a minimum of good will and of aptitude form work, can be sure to find work with one or the other of the many directors who have gladly undertaken the job of organising production. But this is not at all the case. People are not satisfied to persevere all their life in the incessant struggle of rivalry; men do not want to have to appeal to the consumer's vote in order to live. Many men, at least, have other ideals of life.[1307]

[…] The paradox of competition is that it does not survive its own exclusive domination. Woe to the day when it dominates, undisputed, in all moments and in all aspects of life! A rope breaks, if it is stretched too far. […] Who are, in fact, the men who are reduced to executing the will of the blind force which they call competition, market, or adequate prices? Here a principle arises that is put by Röpke with particular energy. The true substance of the economy of competition and of political liberalism does not lie in competition, but in the limits, in the restraints imposed on competition. […] Thus, just as democracy and collectivism are peculiar to a society reduced, by the complete levelling of man, to an unformed mass devoid of spiritual life and internal morale, and prepared for its dissolution in the presence of any hostile shock, so the pure society of competitive economy is prepared for its transformation or degeneration into pure collectivism. Men can no longer stand up to the tension imposed on their nervous, intellectual and moral systems by the competitive fight of every day and of every hour, and are ready to cede the power of deciding about their work, about what is to be produced and consumed, about the quantity of goods to be produced and consumed, to anybody who direct and commands, to the state as the personification of collective will. As

[1307] *Ibidem*, 21.

the perfect democracy flows into a collectivist state, so perfect competition flows into the collectivist economic system. The two equivalents derive from the same degeneration, they are both aspects, one inseparable from the other, of the same historical process. in the same way that democracy can be saved from the collectivistic precipice by erecting bulwarks around it which limit it and force it to make its accounts with anti-democratic institutions, so the economy of competition can be saved only by putting limits to competition itself.[1308]

And, finally, Einaudi warned, with this well-known sentence, that *who seeks economic remedies for economic problems is on the wrong road, a road which cannot lead but to the precipice. The economic problem is an aspect and a consequence of a much larger spiritual and moral problem.*[1309]

The passages that we have quoted from Luigi Einaudi's article represents, in our opinion, the perfect conclusion of the present work. Indeed, although the article was written in 1942, it is very actual and it clearly enlighten the fallacies of a pure *laissez-faire* approach, together with the need to go beyond pure economic considerations while dealing with economic problems, as economy and competition are not a single entity, but they are a part of the broader social context in which they operate. In this sense, Einaudi's approach, and our, as well, appears to promote a shift in how competition is intended, and this scheme was recently delineated also in the *noble competition* concept proposed by Ezrachi and Stucke.[1310] In this sense, we can sustain the need for a *multi-value* approach to competition law, which means a perspective that includes a wider set of societal aspects and which considers competition law as a part of a set of rules aimed at maintaining our societies sustainable (intended in its broad meaning).

At this point, as the very conclusion of this book, it is worth leaving the reader with the following question from Professor Sandell:

The question of markets is not merely an economic question. It's really a question of how we want to live together. Do we want a society where everything is up for

[1308] *Ibidem*, 22-23.
[1309] *Ibidem*, 27.
[1310] A. Ezrachi and M.E. Stukce, *Competition Overdose*, cit., 254-291.

sale or are there certain moral and civil goods that markets do not honor and money cannot buy?[1311]

[1311] M. Sandel, *Why we shouldn't trust markets with our civic life*, TED Talk, 2013, available at https://www.youtube.com/watch?v=3nsoN-LS8RQ (accessed 17 October 2021).

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